

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 154

3117854

BETWEEN

LONG WANG

Applicant

AND

HUNGRYPANDA (NZ)  
LIMITED

Respondent

Member of Authority: David G Beck

Representatives: Applicant in person  
Catherine Pendleton for the Respondent

Investigation Meeting: 22 and 23 March 2022 at Auckland

Submissions Received: 23 March 2022 from the Applicant  
23 March 2022 and 14 April 2022 from the Respondent

Date of Determination: 22 April 2022

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## PRELIMINARY DETERMINATION OF THE AUTHORITY

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### **Employment relationship problem**

[1] Long Wang asserts he was employed by HungryPanda (NZ) Limited (HungryPanda) as a takeaway food delivery driver in the Auckland central business district commencing on 22 May 2020. The engagement ended on 14 July 2020 when Long Wang says he was summarily dismissed. Long Wang is seeking remedies on the understanding he is an employee and that from his perspective the dismissal was unjustified.

[2] By contrast, HungryPanda is claiming Long Wang was an independent contractor and the relationship ended in accord with that relationship due to an unresolved client complaint.

[3] This determination deals with the preliminary issue of the nature of the relationship as to whether Long Wang was an independent contractor or an employee.

### **The Authority Process**

[4] At the investigation meeting I heard evidence from Long Wang and for HungryPanda: Che Zhang, marketing manager and Tianci Wang, delivery manager. The parties also agreed to accept as uncontested, a written statement from Han Lu HungryPanda's accountant based in China and, I received helpful written submissions from HungryPanda's counsel and Long Wang.

[5] I was also very ably assisted during the investigation meeting by James Fu an interpreter.

[6] Pursuant to s 174E of the Employment Relations Act 2000 (the Act) I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders, but I do not record all evidence and all submissions received.

### **Issues**

[7] The issues to be decided are:

- a) Was Long Wang a contractor or an employee?
- b) An assessment of the level of costs to be awarded to the successful party.

### **What caused the relationship problem?**

[8] HungryPanda's online business model established in 2016 and operating in New Zealand from early 2018, is part of a multi-national network headquartered in the UK and operating in Australasia. HungryPanda provides a specialist food delivery service platform for partnered restaurants and grocers via an online app that customers seeking meals or produce, utilise. HungryPanda's niche market is local Chinese food providers and communities. The distinctive feature and success of the business is the app opens in Mandarin (with versions in English being latterly introduced) allowing users to respond using authentic Chinese terms for food required.

[9] Long Wang accepted he was proficient in written English having completed a master's degree in science whilst attending a United Kingdom university but he says he struggles, at times, with communicating in spoken English. Whilst in the United Kingdom, Long Wang worked temporarily in a hospitality position in a hotel. All communication between Long Wang and HungryPanda was conducted in Mandarin (his first language).

[10] Long Wang has resided in New Zealand since 2014, latterly gaining permanent resident status. Long Wang says he has very limited work experience in New Zealand having worked as a cleaner for a short period (two months) and he disclosed no other employment

engagements. Long Wang's IRD statement for the period 1 April 2015 to 6 April 2022, reflected very limited earnings from paid employment or other sources. Long Wang could not recall whether the cleaning job he undertook was the subject of an employment agreement.

[11] Long Wang recalled seeing a HungryPanda advertisement on a Chinese language community website that he has not retained a copy of or can recall the details of. He expressed his interest in working for HungryPanda by providing contact details, age, previous experience, copy of work visa and passport via a WeChat account. On asking about the job, Long Wang was invited to an interview that took place on 14 May 2020.

[12] Che Zhang says the community advert sought to engage a "delivery person" and she conducted Long Wang's interview. Che Zhang says it was possibly her first interview and, not a task she normally undertook as marketing manager. Che Zhang said she changed her smartphone soon after the interview and has retained no WeChat details of exchanges with Long Wang.

[13] The interview took place at HungryPanda's Auckland office in an open area and Long Wang recalled it lasting about twenty minutes. During the interview that was conducted in Mandarin, Long Wang signed an agreement and an IRD tax declaration form headed: "Tax rate notification for contractors". Long Wang conceded he did not read the agreement or the tax declaration form and said he assumed it was a standard employment agreement with PAYE arrangements.

[14] The agreement is written in English. Che Zhang could not recall any versions being provided in Mandarin. Its first page has a heading "Independent Contractor Agreement". Long Wang accepted he wrote his name and address just under this heading in a section with a footer note indicating "the Contractor". Long Wang also signed the last page over a heading: "SIGNED BY THE CONTRACTOR".

[15] Long Wang says at the time, he did not understand the conceptual difference between contractor and employee and the distinction was not explained to him. In contrast, Che Zhang

claimed she explained the distinction and recalled being recently instructed to do this by HungryPanda's management. In written evidence Che Zhang says she indicated it was: "Same as Uber Eats and other food business platforms, you will act as Independent Contractor for providing delivery service". However, no notes were taken during the interview and Che Zhang did not produce any documentation regarding the management instruction that the distinction be explained to prospective delivery drivers.

[16] Che Zhang conceded in oral evidence, she did not explain any of the written terms of the agreement (and was herself not familiar with specific legal terms) or suggest to Long Wang that he take the agreement away for consideration of any changes he may wish to propose and potentially obtain legal advice. No company guideline on the latter requirement was produced.

[17] Che Zhang retained the only copy of the agreement and tax form. Long Wang's subsequent request, when still engaged, to obtain a copy of the agreement was not responded to. Che Zhang says at the time of the interview she assumed from Long Wang's stated experience and qualifications and time in New Zealand, that his English literacy (oral and comprehension) was not an issue.

### **Terms of the agreement**

[18] Whilst Long Wang says he did not examine the agreement and was not provided with a copy, it is my view that some of the terms of such are particularly relevant in assessing the respective rights and obligations the agreement imposes bearing in mind the nature of the role HungryPanda was offering.

[19] Initially the role is concisely described as:

To collect and deliver orders from restaurants to HungryPanda's customers in accordance with the terms of this agreement and the customers' instructions from time to time, which are relayed to the Contractor via an Internet platform.

[20] A heading of “PLACE OF WORK” says the contractor will perform services set out in the agreement and then has a space for such to be specified – no area was inserted but an “example” is included being “Auckland Region or Auckland Central”.

[21] A provision headed “Performance” indicated that if the Contractor was unable to provide services to HungryPanda due to illness or injury:

... on a day which the Contractor has previously notified HungryPanda that they would be able to provide .... the Contractor shall notify HungryPanda as soon as reasonably practicable”.

[22] The above provision is followed with a clause allowing the contractor to appoint a “suitably qualified substitute” as long as the substitute entered into “direct undertakings with HungryPanda, including regarding confidentiality”. Despite requiring unspecified undertakings, the agreement then imposes upon the contractor all liability for remunerating the “substitute”.

[23] The agreement goes on to describe “obligations” including that the contractor will comply with “all reasonable directions and instructions”; “Accept the authority of HungryPanda’s representatives in all administrative matters” and, if the services are defective, bear the costs of any required remedial steps.

[24] “Health and Safety” is covered as being the contractor’s responsibility, but the contractor is also required to be familiar with HungryPanda’s health and safety policies “that may be introduced from time to time”. HungryPanda’s witnesses claimed the company had no written policies.

[25] A restraint of trade clause provides that all “clients and customers” remain the property of HungryPanda and the contractor is prohibited from solicitation or performing services for such for 12 months after the termination of the agreement.

[26] A further clause in the agreement was headed “INDEMNITY FOR EMPLOYMENT RELATED CLAIMS”. Counsel for HungryPanda accepted this clause was likely unenforceable. It however, stated the contractor “shall be fully responsible” for any “liability,

assessment or claim” including costs and expenses should the contractor attempt to exercise their statutory right seeking to declare them to be an employee. It also included a right for HungryPanda to deduct their costs from any payments they owed to the contractor.

### **Tax arrangements**

[27] The agreement contained a clause over the heading “PAYMENT OF TAXES” that:

The contractor is responsible for payment of taxes and other charges due on any payment received under this Agreement, including but not limited to GST, income taxes and accident compensation levies, and shall indemnify HungryPanda for any liability assessed against HungryPanda due to his or her non compliance with this clause.

[28] Che Zhang says she could not recall during the interview, filling in some of the IRD tax form despite handwriting differences being evident in information documented. Whilst saying Long Wang was offered a choice of doing his own tax or HungryPanda looking after it, Che Zhang says she had no understanding of withholding tax and thought the expressed 15% rate on the declaration form was GST. On the latter, Long Wang says he assumed that HungryPanda were just deducting PAYE income tax and he consequently did not pay his own ACC levy nor did he set up a company or register for GST or seek accountancy advice on defraying any business expenses (such as his vehicle and phone).

[29] The IRD records Long Wang obtained and disclosed after the investigation meeting describe schedular tax payments being made by HungryPanda rather than PAYE.

### **The job arrangements explained**

[30] There was consensus that the nature of the job was explained to Long Wang at the interview including how to use HungryPanda’s app to secure work; the area he would work in; the mode of transport he would use and the remuneration structure of \$6 for each completed delivery order (inclusive of \$1 per order to cover fuel costs) that would be reconciled and paid weekly.

[31] Long Wang opted to use his own vehicle (as opposed to the offer of renting a motor scooter from HungryPanda). Long Wang says he was told he could not work for any other food delivery operation whilst he was engaged by HungryPanda. Long Wang says he was also told a uniform would be issued and he observed others wearing it, but such was not later provided to him.

[32] Long Wang says he was also offered the option of an hourly rate of pay but Che Zhang denied this and indicated all delivery persons are paid differing rates based on a delivery fee dependent upon experience and choice of conveyance.

[33] Long Wang commenced working for HungryPanda on 22 May 2020. A pattern of work developed whereby every week a HungryPanda delivery manager would supply him an indicative roster form that Long Wang would return signalling his availability at set times determined by restaurant operating hours and location he would work in (Auckland CBD).

[34] To receive delivery assignments Long Wang had to keep open an app on his phone that would GPS track his location and await collection orders from a HungryPanda dispatcher and then once delivered he had to signal on the app the job had been completed. The allocation of orders was done on a 'first responder' basis with a policy of allocating a limit of two jobs per hour. Che Zhang says the limit was a food safety requirement. Each order has a set delivery time target described in the agreement as "within 60 minutes of the customer making the order in the platform". Long Wang described the pressure of this target on him. This included uncontrolled delays if the provider was not swift in preparing the order and pressure from the dispatcher to respond to orders of insufficient delivery people were available in certain locations.

[35] Long Wang described the app settings he had to activate as first: "order taken" at the outset of the delivery job allocation then: "order preparing" when he arrived at the location to pick the meal up, then: "start delivery" once he got the meal and: "order delivered" when the job was completed.

[36] Long Wang says every week he would receive a documentary indication of how much he was paid for each job and he perceived these documents to be ‘pay slips’. Counsel for HungryPanda contends the notifications translated as “weekly payment statements” and that such is consistent with a contracting rather than employment relationship and that Long Wang’s grasp of written English should have made him able to draw this distinction including that the description of payment was for “order/task” completion. I objectively, do not accept this argument as compelling as it is premised on a sophisticated understanding of contractual terms (quite apart from translation issues). Due to the short nature of the relationship a pattern of working hours was hard to determine but Long Wang indicated it was his sole source of regular work and he would be available for up to forty hours per week.

### **Ending of the relationship**

[37] Matters came to a head on 13 July 2020 when Long Wang says he was involved in his last delivery of the day from a restaurant where he says he had encountered previous problems with orders not being ready and the owner being abusive. Upon finishing the delivery, Long Wang says he received a call from the HungryPanda dispatch manager seeking to meet the next day to discuss the owner of the restaurant complaining about his attitude when picking up deliveries. Long Wang says at the next day’s meeting, he was advised without an opportunity to respond, that he either had to work in a different area (North Shore) or have his contract suspended.

[38] Long Wang says that within three hours of the 14 July meeting he was unable to log into the HungryPanda app; so he texted the delivery manager for an explanation. Long Wang received the following text message (translated from Mandarin with the accuracy of the translation not being challenged):

Our New Zealand delivery department has once again confirmed with the headquarters in Australia. So far, their response is that the merchant complains about your attitude issue, the merchant is considering calling the police. As we thought, it is probably related to the bad reviews they received recently and a malicious slander post. As a service platform, we cannot interfere between merchants and deliverymen. To make sure the merchant has a good impression of our delivery staff,

we have to temporarily terminate your contract. We truly understand your feelings however, as a service platform, there is nothing else we can do. What you can do is to communicate with the merchant. If you disagree with the merchant regarding this situation, please seek legal advice or call the police. Once again, thank you for your support.

[39] On 26 August 2020, Long Wang by way of a letter, raised a personal grievance with HungryPanda claiming he had been unjustifiably dismissed on 14 July seeking remedies including reinstatement and then he filed an application with the Authority on 2 September 2020 maintaining a claim to be reinstated. To date, HungryPanda, despite suggesting a temporary suspension of the engagement, has not offered to re-engage Long Wang.

### **Was Long Wang a contractor or an employee?**

[40] To determine whether Long Wang was a contractor or an employee s 6 of the Act requires the Authority examine the true nature of the relationship and assess all relevant factors. This includes applying the relevant legal tests set out and affirmed by the Supreme Court in *Bryson v Three Foot Six Limited*<sup>1</sup> and considering how the parties went about meeting the terms of the agreement once established.

[41] Given the evident inequality in power between the parties (including in some of the express contractual terms), regard should be had to the object of the Act as set out in s 3. This, amongst other considerations, requires the Authority to recognise and acknowledge there is an “inherent inequality of power” in the employment relationship. A full Employment Court in *Prasad v LSG Sky Chefs New Zealand Ltd* acknowledges this in eschewing a sole focus on a strict test-based formulae, by noting such an approach

.... runs the risk of obscuring the practical realities of working relationships and focusing on form over substance. That is not an approach mandated by the Employment Relations Act and is at odds with the underlying objectives of the legislation (including addressing inherent imbalances in bargaining power). And:

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<sup>1</sup> *Bryson v Three Foot Six Limited* [2005] NZSC 34 (SC).

It is well accepted that the nature of work and the way it is undertaken is rapidly evolving, both within New Zealand and overseas. <sup>2</sup>

[42] Further, the Employment Court in *Leota v Parcel Express Ltd* noted the conceptual distinction in overarching terms as:

An employee works for the employer, within the employer's business, to enable the employer's interests to be met. An independent contractor is an entrepreneur, providing their labour to others in pursuit of gains for their own entrepreneurial enterprise.

[43] The court in *Leota* also referencing *Prasad* noted:

It is now well established that employment relationships should not be viewed through a conventional contractual lens. As the full Court observed in *Prasad v LSG Sky Chefs New Zealand Ltd*:

“[18] We are not drawn to this [strict contractual offer, acceptance, consideration analysis] aspect of the defendant's argument. It seems to us that it has been overtaken by developments in the law, specifically in the employment sphere in New Zealand and in contract law more generally. In this regard the strict contractual approach favoured under the previous Employment Contracts Act 1991 was displaced 17 years ago by the enactment of the [Employment Relations] Act. That Act, as the name suggests, heralded in a new way of looking at contractual relationships in the workplace. It has more generally been acknowledged that a rigid offer/acceptance/consideration approach in contract law can give rise to difficulties.

[19] The reality is that it is not uncommon for workplace relationships (to use a neutral term) to morph over time and to change their nature incrementally, or for their true nature to emerge once the particular factual context is considered. It is certainly not unusual for there to be no contractual documentation, or documentation of any sort, evidencing a relationship. Nor is it unusual for documentation, when it does exist, to mask the true nature of the parties' relationship, either deliberately or inadvertently. And it is not uncommon for one party to have no idea about what the legal framework for the relationship is. This is particularly so in cases involving vulnerable workers. <sup>3</sup>

[44] Taking account of “reality” factor expounded above, the following matters identified in *Bryson* require attention in assessing the real nature of the relationship in this case:

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<sup>2</sup> *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] ERNZ 835 at [20] and [23].

<sup>3</sup> *Leota v Parcel Express Ltd* ERNZ 164[2020] at [31].

- (a) The intention of the parties.
- (b) Whether there was any written documentation setting out the terms of the relationship or 'label' attached to such.
- (c) An examination of how the relationship operated in context including looking at issues of control and integration.
- (d) Whether overall, it could be reasonably established that Mr Burt was operating a business on his own account; and:
- (e) Whether there is overwhelming evidence of any industry practice defining contractual relationships.

[45] In *Southern Taxis v Labour Inspector*, the Employment Court cited Judge Perkins observation in *Clark v Northland Hunt Ltd* that:

None of the common law tests individually will necessarily be conclusive, although respective weight will be placed upon them depending upon the overall factual matrix. What is important is an overall impression of the underlying and true or real nature of the relationship between the parties. <sup>4</sup>

### **Intention of the parties**

[46] Whilst express agreement terms detailing the structure of the relationship are not necessarily decisive, it could not be contended here that HungryPanda's written agreement was misleading – it explicitly and clearly sets out the intended nature of the relationship. Long Wang said he did not read the agreement. Long Wang says he "assumed" it was an employment agreement and he was not familiar, at the time, with the legal distinction between employee and contractor. Had he read them, clauses 1.1 and 1.2 (part of the first cover page) explain what independent contracting entails as c 1.2 states:

The parties agree that nothing expressed or implied in this Agreement or otherwise shall create the relationship of employee and employer between HungryPanda and

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<sup>4</sup> *Southern Taxis v Labour Inspector* [2020] ERNZ 183 at [70] citing *Clark v Northland Hunt Inc* (2006) 4 NZELR 23 (EmpC) at [224].

the Contractor. Nothing in this Agreement is intended to create the relationship of partnership, agency, employment, joint venture or other legal relationship except that of independent contractor.

[47] Objectively, a person choosing to sign an agreement whilst consciously deciding not to read it, should bear the responsibility for the consequences of such an action unless exceptional circumstances are evident. I find Long Wang chose to not to read the agreement and if had done so he may have been better able to appreciate HungryPanda's offer was not one of employment. Although he raised an issue of vulnerability due to English not being his first language, I was not convinced this was a significant enough barrier of capacity in these circumstances. However, given HungryPanda use Mandarin as a medium of communication and the context of their business model, it is inexplicable they did not provide an agreement in that language or at least a guide to its crucial terms and import of such in Mandarin.

[48] The inexperienced HungryPanda interviewer did not take the basic step of providing a copy of the agreement, ensuring Long Wang took time to consider it or obtain advice or at least go through some of the terms of the agreement with him, including some of the distinctly onerous terms (e.g., the indemnity and deductions provisions). I got the impression Che Zhang lacked the knowledge needed to explain the more complex legal terms. This is no criticism of Che Zhang; she simply should not have been placed in this situation without detailed guidance and some relevant explanatory documentation.

### **The Control Test**

[49] Applying this consideration requires the Authority to examine where the ultimate authority in the relationship lies.<sup>5</sup>

[50] Overall, the timing of each engagement and work allocation was always, under the control of HungryPanda's customers using the HungryPanda app. This directed Long Wang to undertake the work as and when needed. Long Wang had nominal control over when he

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<sup>5</sup> Gordon Anderson and John Hughes, *Employment Law in New Zealand* (1<sup>st</sup> ed, Lexis Nexis, Wellington, 2014) at 121: *Humberson v Northern Timber Mills Ltd* (1949) 79 CLR 389 (HCA).

undertook the work and when he chose to make himself available to do so. He had no ability to expand the customer base to his advantage. A distinctive feature of HungryPanda's business is a lack of 'face to face' interaction with their food delivery drivers. The business is essentially remote controlled.

[51] I accept that the roster provided to Long Wang by HungryPanda was an 'indicative' one to detail availability for delivery assignments. This differs from a normal work roster. I equally accept that Long Wang (although not contractually bound to do so) felt obligated to be available to take on assignments at the times and location he had indicated he was available for. In doing so, he experienced downtime where he was available but no work was allocated or others 'got in first' to obtain assignments.

[52] I did not accept as convincing, a suggestion that Long Wang could not return the roster and simply log in when he wanted to 'grab orders. Nevertheless, there was scope for Long Wang to indicate on the roster that he was not available at times. HungryPanda's counsel noted there was an evidential dispute as to whether Long Wang could choose what area he worked in but asserted he was not directed "where to drive to and when". Whilst suggesting that HungryPanda was entitled to direct a contractor to work in a certain area to meet a commercial imperative, counsel asserted this could be done without specifically directing the delivery driver "where or when to drive".

[53] Notwithstanding some elements of 'light touch' control, this is precarious work. No availability payment is in place. Payment for work is not calculated on an hourly basis. HungryPanda had complete control over the jobs allocated and computation of pay for the jobs completed. There was a restricted span of hours in which Long Wang could earn from assignments subject to food outlet opening hours. In the latter circumstances, Long Wang was powerless.

[54] I find HungryPanda exercised control over the timing and allocation of work and where it was to be performed, they set remuneration at a fixed per job rate, controlled information available on jobs and communication with customers.

[55] Long Wang had a notional ‘choice’ over his hours and place or area of work and the routes he took to deliver product albeit that he had no minimum income guaranteed nor was he remunerated for being available for work. Whether the latter factors amount to autonomy and independence is a moot point.

[56] In weighing up factors, whilst Long Wang has a significant degree of choice over when and where he chose to work, the model of business gives HungryPanda significant control over him when he is working and this factor marginally tips in Long Wang’s favour.

### **The Integration Test**

[57] This test requires a consideration of whether Long Wang could be viewed as an integral part of HungryPanda’s business. It is relatively easy to determine this test at a conceptual level as the delivery drivers are essential and integral to HungryPanda’s business model. Although dispatchers are engaged and presumably technical staff to maintain the IT platform alongside digital marketers, the only tangible ‘public face’ of the business is the delivery drivers. On the ‘other side of the coin’ Long Wang used his own vehicle and was responsible for its upkeep without any strict requirements on presentation. The vehicle did not display HungryPanda signage. If Long Wang had been provided with a copy of the agreement he signed, he would have been aware that he could contract a substitute driver if he was unable to provide a service but that is a somewhat illusory benefit as he had no set amount of guaranteed work to undertake.

[58] I find Long Wang was integral to HungryPanda’s business and the application of this test leans toward categorising him as an employee.

### **Fundamental Test**

[59] This test considered whether Long Wang could reasonably be in business on his own account or performing services on his own account and thus assumed an element of risk in his engagement with HungryPanada including profit and loss from any joint venture. In a traditional sense of a contracting situation a business engages specialist assistance/expertise or

help with work overload but the delivery people at HungryPanda have a different profile – no specialist skills are deployed other than holding a driver’s licence and there is no opportunity for the ‘contractor’ to generate or grow their business or opportunity to garner the good will of customers for their own benefit.

[60] I found no evidence that Long Wang ran a business on his own account – he owned no plant or equipment, beyond his vehicle that was not purchased in contemplation of setting himself up in business. He did not use an accountant or explore defraying business expenses. Long Wang did not contract with other companies. Essentially, all Long Wang had to offer was his labour - at best, he was a dependent contractor.

[61] I directed HungryPanda after the investigation meeting to provide information on the ethnic/country of origin and work visa status of their employees so that I could get a wider picture of the composition of the workforce and assess general vulnerability issues, if any. HungryPanda refused to provide such information citing privacy issues and claimed irrelevance. Instead, Bochen Du, HungryPanda’s New Zealand country manager (based in Los Angeles) provided an affidavit that confirmed that in recruitment they “targeted the Chinese community because HungryPanda globally started its business operations specifically targeting Chinese consumers” in Mandarin and no profiling information was “retained” on employees. I observe this did not address the Authority’s direction for more detailed information.

[62] In applying the fundamental test, I am also obliged to take into consideration in this context, the objectives set by the Act as discussed. I find that this this type of engagement and business model has all the element of a dominant party setting terms and that party was not Long Wang.

### **Taxation Issues**

[63] Long Wang did not invoice for his services nor was there any evidence from limited text exchanges that he was asked to do so.

## Industry Practice

[64] There was no direct evidence from the parties from which to determine what industry practice is, other than a suggested comparison with Uber Eats and by implication, other IT platform-based food delivery operations. I do not find comparisons with taxi or courier operations are apt. In a hierarchy of potential vulnerabilities, I consider take-away food delivery drivers to be in a more precarious position to case comparisons made (see below) with more limited earning opportunities.

[65] The Supreme Court in *Bryson* held that industry practice is a factor, but it is not conclusive in establishing the intention of the parties and cannot override other factors such how the relationship operates in practice.<sup>6</sup> The Employment Court recently, in *Leota*, suggested a cautionary approach was warranted to avoid “the tail wagging the dog” in cases where industry practice may just reflect a mistaken understanding of the status of some or all workers in a specific industry or service environment.<sup>7</sup>

## Submissions

[66] HungryPanda’s counsel drew my attention to relevant case law including *Leota v Parcel Express* for comparison on the vulnerability Long Wang was claiming and suggested that his situation was factually “substantially aligned” with *Arachchige v Rasier New Zealand Ltd*.<sup>8</sup> The latter case involved an Uber taxi driver failing to establish a claim that he was an employee rather than a contractor. Whilst the cases cited broadly assist with my approach, I do not find alignment with any decided cases helpful. As explained above, the popular descriptor “Uber model” of employment used to describe an IT platform-based business, has general gradations of vulnerability for workers so engaged with Long Wang wielding little, if any, bargaining power and control. The reality of his relationship with HungryPanda is in my view, most akin

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<sup>6</sup> At [40].

<sup>7</sup> *Leota v Parcel Express Ltd* [2020] NZEmpC 61 at [38].

<sup>8</sup> *Arachchige v Rasier New Zealand Ltd* [2020] ERNZ 530.

to that of a low paid casual 'on-call' employee with no guaranteed hours.

### **Overall finding contractor or employee?**

[67] Section 6 of the Act requires the Authority to determine the true nature of the relationship. For the reasons discussed above, taking account of the totality of the relationship and how it operated and the objects of the Act, I conclude the real nature of Long Wang's engagement was as an employee and not an independent contractor.

### **Conclusion**

[68] I conclude that Long Wang is an employee rather than an independent contractor and as such can pursue his identified personal grievances.

### **Costs**

[69] Costs are reserved pending the Authority's substantive determination of Long Wang's personal grievance.

**David G Beck**  
**Member of the Employment Relations Authority**