

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 644
3325900
3325920

BETWEEN ZIYU XIAO & YOUTIAN
 YANG
 Applicants in 3325900

AND LIMEI LIU
 Applicant in 3325920

 FAST HORSE LIMITED t/a
 FAST HORSE EXPRESS
 Respondent

Member of Authority: Peter Fuiava

Representatives: May Moncur
 No appearance by the Respondent

Investigation Meeting: 3 July 2025 in Auckland and by audio-visual link

Submissions and information received: 14 July 2025 from the Applicants

Determination: 13 October 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Ziyu Xiao and her husband Youtian Yang and Ms Limei Liu, who now lives in Australia, have each brought claims of unjustified dismissal, unjustified disadvantage and have applied for penalties for a breach of good faith under the Employment Relations Act 2000 (the Act) and the Minimum Wage Act 1983 to the Authority to investigate and determine. However, before these substantive claims can be investigated, a determination on employment status is required with the applicants saying they were employees of Fast Horse Limited, a parcel courier business which trades as Fast Horse Express (FHE or the company).

How has the Authority investigated the preliminary issue?

[2] On 28 January 2025, I held a case management conference by telephone with the applicants' representative, May Moncur, and the respondent's then representative, Yewon Jun of Capstone Law Limited. It was agreed that before the substantive issues of unjustified dismissal and disadvantage could be investigated, I needed to first determine as a preliminary issue, the real nature of the parties' relationship.

[3] For my investigation, I was provided with written witness statements from each of the applicants. However, after the case management call, FHE lodged with the Authority on 6 May 2025 a notice of change of representation which was signed by Ms Yu Hua Lin and advised that the company was now acting for itself in place of Capstone Law. The notice further advised of a new email address for FHE which the Authority has since used to email the company when required.

[4] FHE has not provided me with its written witness statements and despite knowing the date of the in person investigation meeting for the preliminary matter, it failed to attend at the appointed time. There being no appearance by the company, the investigation meeting proceeded pursuant to clause 12 of the Second Schedule to the Act as if it had attended or been represented.

[5] All witnesses answered questions under oath or affirmation from me and Ms Moncur. Leave was granted for Ms Liu to attend the investigation meeting remotely via Teams as she departed New Zealand with her husband and family and now resides in Brisbane . As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What are the relevant facts?

[6] Ms Xiao worked for FHE for approximately six months from 13 September 2023 to 18 March 2024. She had been looking for work in 2023 and saw on SkyKiwi, an influential Chinese-language media platform in New Zealand, an advertisement from the company for part-time and full-time drivers.

[7] The advertisement directed applicants to download FHE's mobile "app" to their smartphone which Ms Xiao did. She stated that although she was not formally

interviewed, the app required her to provide the company with personal information such as her vehicle and driver's license details, bank account number, tax information, visa status, and to complete a criminal record check through a third-party website.

[8] Ms Xiao was subsequently notified through the app that her application had been approved and that she was to await orders which she received from her manager, Ms Liao, via WeChat, a Chinese messaging, social media, and mobile payment app. It was Ms Xiao's evidence that FHE did not require her to sign either a formal employment agreement or an independent contractor's agreement. It may be noted that attached as an appendix to FHE's statement in reply in the Authority is an "Independent Contractor Terms of Service" agreement (the independent contractor agreement), however, this document has not been signed by any of the applicants.

[9] Ms Xiao's husband Mr Yang stated that she had introduced him to FHE and had similarly downloaded and installed the company app on his smartphone and followed its instructions. In addition to providing his visa details, driver's license, vehicle information, police clearance certificate, tax information, and bank account details, he also signed an IR 330C tax form. Such a form is completed by those who receive schedular payments that are made to non-employees such as independent contractors, freelancers, self-employed individuals and labour-only contractors.

[10] Similarly to Ms Xiao and Mr Yang, Ms Liu, also saw a job posting on SkyKiwi and after speaking to an FHE representative, downloaded the company app to register and apply for a package delivery position. However, in contrast to Ms Xiao and her husband, there were two different phases with respect to Ms Liu's work for FHE. The first phase; from 12 December 2023 to 22 February 2024, Ms Liu was engaged by the company as a delivery driver. However, the second phase; from 22 February to 4 March 2024, she was employed as a warehouse worker. Ms Liu's present claim in the Authority only concerns the work she did in the first phase or as a delivery driver because the second phase of her employment as a warehouse worker is the subject of a settlement agreement with which the company has complied.

[11] All three applicants state:

- (i) that they were required to wear reflective vests for FHE which had the company logo;

- (ii) were required to complete IR330C tax forms;
- (iii) were each issued with a driver handbook that specified delivery and pickup timelines, set out penalties for delays, established delivery quality standards, and stated that drivers who violated these rules more than three times would have their app accounts banned;
- (iv) they were not able to subcontract their duties to anyone else as the app did not allow for multi-device logins;
- (v) the app did not contain a copy of their individual employment agreement or the independent contractor agreement;
- (vi) the first time they have seen the independent contractor agreement was through their employment advocate, Ms Moncur, as part of the Authority's investigation;
- (vii) they were solely dependent on FHE for their earnings and could not supplement their income elsewhere;
- (viii) their income depended entirely on the number of orders and delivery areas assigned to them by the company;
- (ix) that WeChat and WhatsApp were the primary means of communication with management;
- (x) the FHE app was the way in which orders were automatically assigned to a driver but not always in their preferred delivery zone;
- (xi) the app resulted in significant financial dependence on FHE which inhibited them from securing a stable income from other channels;
- (xii) they were required to follow strict timeframes for picking up and delivering parcels from FHE's warehouse which would penalise drivers if they parked their vehicles incorrectly or did not arrive to the warehouse on time;

(xiii) they were responsible for their own vehicle insurance, vehicle maintenance, and mobile phone costs but understood that their wages subsidised or reimbursed them for their work-related petrol use; and

(xiv) they assumed FHE paid their tax as this was already deducted from their wages.

[12] A copy of the “Driver Training” handbook (the handbook) was provided to the Authority and it instructs drivers to adhere to its guidelines and “bottom lines”. It sets out standards which if breached or violated could result in deductions in pay or a two-day suspension from work and “mandatory retraining”:

All drivers are required to follow these delivery guidelines. The system includes a rating system that operates on a survival of the fittest basis. Excellent drivers can ensure 3-4 days of preferred area assignment per week.¹

[13] It was Ms Xiao’s evidence that she believed that she was being monitored at work after she received a WeChat message from her “driver manager” Ms Liao. While delivering orders, Ms Liao contacted Ms Xiao and said that she had “50 more to go.” When asked by Ms Xiao whether she was watching her, Ms Liao responded that she monitored everyone.

[14] All three applicants stated that the consequence for having unfinished deliveries at the end of their day was having work cancelled the following day. Further, any unreported incidents would lead to a two-day suspension and mandatory training. A lost package could result in a permanent account ban. Drivers were discouraged from handling issues privately and if they did so, a two-day suspension, retraining and further assessment could result.

[15] The applicants reported a similar process with their day-to-day work which started with the next day’s orders being automatically assigned to them through the app. Drivers were expected to collect their parcels the evening before delivery and were given a strict 30-minute pickup window to collect their parcels from FHE’s warehouse with no early or late arrivals.

¹ Highlighted in red in the original document.

[16] While drivers were able to specify their preferred delivery zones, this was not always followed by FHE, for example, Ms Xiao and Mr Yang preferred to deliver within West Auckland or North Shore being areas they were both familiar. However, the company would assign them deliveries outside these areas.

[17] The applicants gave similar evidence regarding different classes of drivers. Ms Xiao stated that after working for FHE for approximately one month, she was invited by Ms Liao to become a “VIP” driver which would provide her with full-time work but that she would need to “co-operate fully”. However, after becoming a VIP driver, Ms Xiao stated that she could not go on leave without first seeking permission from her other driver manager, Mr Zhang Tianyu, who told her that VIP drivers could not take leave arbitrarily without consent.

[18] In her oral evidence to the Authority, Ms Xiao explained that the other group of drivers were “normal drivers” and that there were “quite a lot” of them approximately 30 to 40 during her time. However, there were not many VIP drivers by comparison with Ms Xiao knowing 10 to 15 VIP drivers only.

[19] Mr Yang stated that he was one of the “normal drivers” who believes “without doubt” that he was an employee of the company and not an independent contractor. This was because he was required to follow Mr Zhang Tianyu’s instructions and that the whole process of his work was monitored by the app which Mr Yang used during work and that only he could access. From the point of entering FHE’s warehouse to collect parcels, until he finished work for the day, he was required to wear the company uniform. For doing something incorrectly, Mr Yang stated that he could be penalised financially and that he received seven such penalties while working for the company.

[20] Although Ms Liu had heard of VIP drivers during her time at FHE, she was also aware of another classification system “S”, “SS” and “SSS” drivers and was told by Mr Zhang Tianyu that she was an S-level driver and that if the company regulations were violated, a driver’s classification could be downgraded. If their work was excellent, a driver could be afforded priority in choosing their delivery area. It was these practices that led Ms Liu to believe that she was an employee driver for FHE.

[21] Ms Xiao stated that Ms Liang photographed improperly parked vehicles at FHE's warehouse and demanded immediate corrections while threatening account bans for repeat offenders. This is consistent with the driver handbook which relevantly states:

Attention! Do not park vehicles opposite the warehouse, as this could cause road blockages or vehicle damage, for which you will be responsible! Do not block the warehouse entrance, as complaints from other drivers will be recorded!

... If you are *one hour late*, your order will be *removed* and *reassigned* to another driver, and you will also receive a penalty of a *two-day suspension* from work.²

[22] When parcels were delivered, drivers were required to take photographs of the parcel with the number of the building, house or apartment in the background. If drivers provided "non-compliant" photographs, this could result in a warning or a deduction in wages. The handbook warned drivers not to capture a customer's face in their photograph as a violation of that rule could result in immediate dismissal.

[23] Ms Xiao's written witness statement to the Authority, the contents of which she affirmed were true and correct, records that she received three warnings for non-compliant photos and a \$5 deduction. She also received a further deduction of \$37.20 for a lost package. Ms Xiao's written brief further states that Ms Liao required drivers to call customers for at least 30 seconds until they could be redirected to their voicemail. Ms Xiao further stated that Ms Liao was able to contact drivers via a hidden feature in the app.

[24] Undeliverable packages had to be returned to the warehouse by the deadline that was made known to drivers through their WhatsApp group. Warehouse staff were responsible for scanning returned items. The company's app recorded a driver's completed deliveries which also displayed their earnings. Ms Xiao stated that the entire process relied on FHE's app and that Ms Liao and Mr Zhang Tianyu strictly controlled her work methods, schedule, attire, vehicle use and workflow including:

- (i) Ordering of assignments: FHE assigned orders via the app; Ms Xiao was not able to choose delivery times or the customers. As a VIP driver, she was required to accept all assigned orders.

² Bold and italicised text highlighted in red in the original document.

- (ii) Uniform policy: Mandatory wearing of FHE-branded reflective vests at all times during work including while at the warehouse.
- (iii) Monitoring: Deliveries were tracked in real-time; ratings and penalties were based on customer feedback.
- (iv) Penalties: Fines, work suspensions, and account bans were imposed for violations.

What is the relevant law?

[25] Section 6 of the Act governs the determination of whether a person is an employee or an independent contractor which requires the Court or the Authority to determine “the real nature of the relationship” between the parties.³ In going about this task, consideration must be given to “all relevant matters”⁴ by having regard to the common law tests of control, integration and whether the individual is effectively working on their own account (the fundamental test).⁵

[26] Recently, the Court of Appeal in *Rasier Operations BV v E Tū Inc* has had to reframe the fundamental test in more orthodox terms so as to focus attention on the true nature of the arrangement between a worker and their principal. In other words, is the worker in business on their own account? Or are they employed in the principal’s business?⁶ In applying s 6 of the Act, the Court of Appeal considered it helpful to approach the inquiry in two stages:⁷

The first stage involves identifying the substance of the parties’ mutual rights and obligations as a matter of reality. The second stage involves determining whether those rights and obligations amount to a contract of service...

Section 6 reinforces the common law requirement to focus on the substance of the parties’ agreement when determining their mutual rights and obligations. It emphasises the importance of the real nature of the relationship, ascertained by reference to how that relationship operates in practice. And it emphasises that labels in the parties’ agreement, or in other statements by the parties, are not determinative.

³ The Act, s 6(2).

⁴ Section 6(3)(a).

⁵ *Bryson v Three Foot Six Limited (No.2)* [2005] ERNZ 372 at [32].

⁶ *Rasier Operations BV v E Tū Inc* [2024] ERNZ 789 at [134].

⁷ At [97].

[27] It was further observed in *Raiser* that where there is a written contract governing the relationship between the parties, this would usually be the logical starting point for the first stage of the analysis.⁸

Analysis

[28] As previously mentioned, attached in support of FHE's statement in reply was its independent contractor agreement. While this purports to establish a self-employed contractor agreement with Ms Xiao, Mr Yang and Ms Liu, as has been noted, a signed copy of the independent contractor agreement was not provided and the applicants say they have not seen the document before until it was provided to them by their employment advocate as part of this process. In addition, all three applicants stated at the investigation meeting that the app does not provide a copy of either an individual employment agreement or the independent contractor agreement.

[29] In the absence of a signed copy of the independent contractor agreement by Ms Xiao, her husband Mr Yang or by Ms Liu, I am not able to logically start my analysis by having regard to a written contract. However, even if there was a signed independent contractor agreement between the parties, labels in any such agreement, or statements made by the parties describing the nature of their relationship is not to be treated as being determinative.⁹

[30] The handbook does contain references to drivers being paid \$30-\$35 per hour, including GST. It is noted also that the applicants were required to complete an IR330C form which suggests on its face that they were independent contractors who needed to account for their own GST and for their own income tax. However, I do not consider tax status as determinative of s 6 of the Act the focus of which is the real nature of the relationship as evidenced by the parties' conduct and how their agreement operated in practice rather than how the parties may have structured their tax affairs.¹⁰

[31] The independent contractor agreement contains several provisions which are simply window-dressing and designed to convey the impression that the relationship between FHE and the applicants was that of independent contractors working under a contract for services. The independent contractor agreement stated (purportedly):

⁸ At [99].

⁹ The Act, s 6(3)(b).

¹⁰ *Atkinson v Phoenix Commercial Cleaners Ltd* (2015) 12 NZELR 627 at [46]-[55].

- (i) delivery drivers were self-employed contractors who provide contracted services to FHE;
- (ii) drivers conducted or undertook their own business;
- (iii) drivers were not employees of FHE;
- (iv) there was no obligation on drivers to use the company app or provide contracted services to it;
- (v) drivers were responsible for providing their own equipment (for example, a car and phone) and maintaining their own tax and insurance arrangements;
- (vi) that by logging into the FHE platform, drivers agree that they are independent contractors;
- (vii) there was no supervisor or individual in FHE to whom drivers were required to report;
- (viii) there was no requirement for drivers to display any FHE signage either on their vehicle or on themselves;
- (ix) there were no regular performance evaluations by the company; and
- (x) FHE did not require or suggest any specific route for each of the contracted services.

[32] However, these terms and conditions in the independent contractor agreement are completely at odds with how the parties' working relationship operated in reality. Ms Xiao, Mr Yang and Ms Liu stated that all orders were assigned to them through FHE's app which was closely monitored by their managers Ms Liao or Mr Zhang Tianyu. The app was linked to the applicants' smart phone devices which generated delivery routes and tracked their progress. The app was also used to upload photographs of delivered items with substandard or non-compliant photos used as evidence to issue warnings or for deductions. As has been noted, the worst violation could potentially result in immediate dismissal.

[33] There was a high level of control exerted by FHE over Ms Xiao, Mr Yang and Ms Liu's work when they were logged into the app. Despite the independent contractor agreement purporting that they could accept, reject, and in certain circumstances cancel delivery requests without consequence, the reality was that if parcels were not delivered, they each faced deductions with their pay or worse, FHE could place them on a two-day suspension. The applicants had no ability to subcontract their work out because the app did not allow for multi-device logins and everything was done via the app.

[34] The level of control exercised while a driver is logged into the app is consistent with an employment relationship during these periods. Although FHE's independent contractor agreement suggested that the working relationship it had with each of the applicants was not exclusive and that they were free to work with competing businesses, such freedom (if any) was illusory. Ms Xiao, Mr Yang and Ms Liu were required to pick up parcels from FHE's warehouse the evening before their designated delivery runs and the full-time nature of their work for the company gave them no time to work for anyone else.

[35] The applicants did not have company-branded signage on their private vehicles, but they were required to wear at all times high-visibility vests that bore the FHE logo. Ms Xiao, Mr Yang and Ms Liu were integrated into FHE's business because without them, the company would have no courier service to offer to the public.

[36] Turning to the "fundamental test", there is nothing to suggest that the applicants had the ability to do things differently or to manage their deliveries in a way that benefitted their own interests over FHE, for example, choosing what packages to deliver or what route to take. If the applicants were in business for their own, there was a paucity of evidence of autonomy and independence from FHE that would enable them to promote their own businesses and customer good will.

Conclusion

[37] Section 6 of the Act requires the Authority to determine the true nature of the relationship. Despite the presence of an independent contractor agreement by FHE, and references in its handbook to an independent contractor relationship, the way the relationship operated in practice points to an employment relationship with each of the

applicants. The high level of control the company exerted while Ms Xiao, Mr Yang and Ms Liu were logged into FHE's app and their lack of freedom and autonomy to promote their own business, leads me to conclude that the real nature of their relationship to the company was that of employees and not as independent contractors.

Costs

[38] Costs are reserved pending the Authority's substantive determination of the applicants' personal grievances against their former employer.

Peter Fuiava
Member of the Employment Relations Authority