BROADLEY REES HOGAN

FOOD FOR THOUGHT

Gig economy decision a timely reminder for all businesses seeking to maximise competitiveness

By MARIJA STAVRIC, LAWYER
and JAMIE ROBINSON, CONSULTANT

DECEMBER 2018

A recent decision of the Fair Work Commission has wide-ranging implications for businesses endeavouring to be innovative with their workforces by operating in the gig economy – utilising short-term independent contracts for the provision of service or freelance work rather than ongoing employment.

Whether people working for companies like Deliveroo, Uber and Foodora (or any other company for that matter) are independent contractors or employees critically defines the opportunity for innovation and the risks that they are exposed to; in particular, award payment obligations, superannuation, tax, unfair dismissal claims etc.

In *Joshua Klooger v Foodora Australia Pty Ltd*[1] Commissioner Cambridge decided that a food delivery bicycle rider was an employee of Foodora, and consequently, was protected from unfair dismissal under the *Fair Work Act 2009*. As a result, Foodora was found to have unfairly dismissed Mr Klooger for speaking out about worsening pay conditions and was ordered to pay him compensation in the amount of $15,559.00.

1 [2018] FWC 6836.

For the purpose of determining if Mr Klooger was entitled to bring an unfair dismissal claim, Commissioner Cambridge carefully analysed the circumstances of Mr Klooger's working relationship with Foodora.

The factual analysis was based on the application of the well-established 'multifactorial'[2] approach for the assessment of the nature of the relationship. This approach requires evaluating the overall effect of various aspects of a relationship to determine whether the worker is serving an employer for the benefit of the employer's business or truly carrying on a business or trade for their personal benefit (i.e. who benefits from the goodwill of the work).

In this case, the most relevant factors considered by the Commissioner were:

- Control
  - Foodora fixed the geographical location and start and finish times of shifts via their app.
  - Foodora used a batching system to evaluate the performance of workers and more favourable shifts were made available to better workers.
  - Mr Klooger was required to wear Foodora's uniform and carry equipment with the Foodora brand.
- Delegation and sub-contracting
  - Foodora did not preclude Mr Klooger from working for other similar food delivery services or from sub-contracting or delegating his duties.
  - The contract terms precluded Mr Klooger from sub-contracting.
- Contract terms
  - Whilst the contract between the parties used words sought to establish Mr Klooger as an independent contractor, it was in a similar form to an employment contract.
- Taxation
  - Foodora did not deduct income tax from Mr Klooger's remuneration.

Stepping back and evaluating the overall effect of Mr Klooger's working relationship, Commissioner Cambridge ultimately determined that Mr Klooger was not carrying on a trade or business of his own but rather was working as part of Foodora's business and integrated to its business.[3]

With the gig economy challenging the fundamentals of how business is done and reaching into a variety of industries and companies striving for competitive innovation, it is not surprising that this decision has caused wide comment. This is particularly so when it is juxtaposed against the recent decision of the Federal Court in *Workpac v Skene*[4] arguably decreasing the flexibility for employers engaging casual employees.

The well-established multifactorial approach may have unintended consequences when applied to the new innovative constructs using emerging technologies operating in the gig economy. Indeed Commissioner Cambridge reflected on the public importance/interest of the need to expand and modify the approach.

The Commissioner also commented that allowing people to contract in and out of work was essential to commercial activity; however, as the Commissioner also noted, this needs to be balanced against protecting workers from businesses who seek to use independent contracting to avoid their obligations and responsibilities as employers.[5]

Whilst the decision suggests there is a need for the law to evolve, it also reinforces that until that occurs, all businesses regardless of whether they work in the gig economy or not should take this decision as a welcome reminder to review their current working arrangements and contracts to ensure that they are maximising their workforce flexibility to ensure maximum competitiveness, without unnecessarily exposing themselves to a variety of significant risks like Foodora.

For assistance or more information about these matters or any matters regarding Employment and Work Health & Safety services, please contact Jamie Robinson.

JAMIE ROBINSON | CONSULTANT
Employment and Work Health & Safety
D (07) 3223 9136
E jamie.robinson@brhlawyers.com.au

2 *Hollis v Vabu* [2001] HCA 44; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

3 *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 at [102].

4 [2018] FCAFC 131.

5 Ibid at [103] – [106].