Article Information

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The curious case of the calculating courier

Engagement of "gig-economy" workers has been a hot topic, particularly in the case of food delivery businesses. The Fair Work Commission recently concluded that a delivery rider for Foodora was in fact an employee, rather than an independent contractor.

German-based food delivery app, Foodora, has been the subject of extensive media coverage recently, facing challenges to its staffing model on a number of fronts, prior to its voluntary administration in 2018.

While the Fair Work Ombudsman's sham contracting case was dropped, one outspoken delivery rider's unfair dismissal claim was allowed to continue, with judgment handed down in November 2018.

Joshua Klooger started performing work for Foodora on 11 March 2016, pursuant to a document called an "Independent Contractor Agreement".

At first, Foodora delivery riders were paid a flat rate of $14 per hour for a "shift", plus $5 per delivery. The hourly rate was removed by the end of 2016, replaced by a flat fee per delivery, which reduced a number of times to hit $7 per delivery in February 2018.

Mr Klooger wore Foodora branded clothing and had a Foodora branded insulation box. Mr Klooger used his bicycle to perform deliveries. Communication to resolve any issues concerning shifts, or issues with particular orders were dealt with using the communications application "WhatsApp".

Mr Klooger was a bit of an entrepreneur himself, and started in October 2016 to let other delivery riders use his Foodora app logins to perform work. This started when one of his friends who was a Foodora delivery rider had his Australian visa cancelled, and was no longer lawfully allowed to work in Australia. Mr Klooger let his friend complete Foodora shifts as if he were Mr Klooger. Mr Klooger would deduct 18% of the Foodora payments for taxation, plus a 1% deduction for himself, remitting the remainder to the substituted rider. This was referred to in the decision as the "substitution scheme".

The substitution scheme grew to such an extent that Mr Klooger started to refer to it as the "Josh Klooger Delivery Company". Foodora became aware of it in September 2017, and commended Mr Klooger for his initiative. The contract between Mr Klooger and Foodora stated that any sub-contracting required Foodora's prior written consent.

In around October 2017, the terms of engagement for Foodora changed. Shifts for delivery riders were scheduled in a different way, being optimised so that better performers had the first choice of shifts. The additional complications this change caused resulted in a number of delivery riders needing to communicate to swap shifts, but the original WhatsApp group had reached its limit. Ever the entrepreneur, Mr Klooger set up a new group for these kinds of communications using an app called Telegram. He set himself up as an administrator, but also gave Foodora administration rights.

The relationship between Mr Klooger and Foodora broke down in 2018, at the same time as the rates dropped to $7 per delivery. Mr Klooger went on the Channel Ten program, The Project, to complain about the rates, with the support of the Transport Workers Union.

Foodora also started to demand that Mr Klooger relinquish all administrative rights to the Telegram application to Foodora. This culminated in Foodora advising Mr Klooger that it would no longer seek his services as a delivery rider on 2 March 2018.

Mr Klooger commenced proceedings in the Fair Work Commission seeking compensation for unfair dismissal, on the basis that he was an employee.

The Fair Work Commission was required to consider the common law "multi-factor" test to determine whether Mr Klooger was an employee or an independent contractor.

Mr Klooger pointed to the fact that he had no relationship with the restaurants or customers to whom he delivered food, and therefore had no business or goodwill of his own. He further said that the fact that work was organised according to shifts was determinative that his personal labour was required, rather than being engaged to produce a result. Mr Klooger also said that Foodora exercised great control over how he conducted the work, including penalising drivers (through termination) who failed to undertake deliveries during their allocated shifts. Mr Klooger argued that the Commission should not take any notice of the fact that the contract between him and Foodora referred to a non-employment relationship.

Foodora focused on the fact that Mr Klooger had delegated the work to other people, through his Josh Klooger Delivery Company. The ability to delegate work to another has been held in a number of cases to be a key consideration for concluding that a person is engaged as an independent contractor, rather than an employee. Foodora also argued that Mr Klooger did have his own business, albeit a rudimentary one, his Josh Klooger Delivery Company moniker. Foodora further said that the fact that work was allocated by "shift" did not mean that a delivery rider was obliged to accept particular shifts.

The Fair Work Commission concluded that the substitution scheme was not determinative, because it was engaged in, initially, in breach of contract. The Commission was also concerned by the fact that the substitution scheme appeared to allow people to undertake work in contravention of Australian law (in the case of the rider with the cancelled visa).

The Commission concluded that Mr Klooger was not carrying on a trade or business of his own, that he was part of Foodora's business and was "presented to the world at large" as an emanation of the Foodora business, through the control exerted in the scheduling process as well as the requirement to wear uniforms and used branded livery.

Having found that Mr Klooger was an employee, the Fair Work Commission went on to conclude that he had been unfairly dismissed and awarded compensation.

Although this decision has received a lot of media attention as a "wake up call" for gig-economy operators such as Deliveroo and UberEats, the reality is that the particular arrangements in place at Foodora were quite different from what other organisations do. Hourly rates of pay and "shift work" arrangements would not seem to be universal in the industry.

Piper Alderman Consultant, Professor Andrew Stewart says, "This is going to be an important precedent, but it is not going to tell us anything definitive about the status of people doing similar work for the likes of Deliveroo or Uber Eats. There are going to have to be cases involving those companies which investigate their particular arrangements."

All organisations who engage contractors will need to be very careful to bear in mind whether their written contracts actually reflect what is occurring in practice.

If you are uncertain whether your independent contracting agreements are up to scratch, contact a member of Piper Alderman's Employment Relations team for an assessment.