Article Information

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Service: Employment & Labour

Food delivery service "gig economy" operators under the industrial spotlight

The Fair Work Ombudsman has recently commenced proceedings against food delivery application "Foodora" in the Federal Court of Australia alleging that the "gig-economy" platform has engaged in sham contracting.

The "gig economy" has moved on from disrupting the taxi industry. Now, rather than telephoning your local pizza parlour for your guilty-pleasure quattro formaggi, foodies can open an app on their mobile phone to order, pay, and arrange delivery to their current location, with the delivery driver having no arrangement with the food supplier, other than to walk in and collect the order.

A number of these mobile applications exist, where drivers are put in contact with purchasers and venues. The Fair Work Ombudsman, as part of their current focus on the status of workers within the "gig economy", has come to the view that at least one such organisation, Foodora, is engaging in sham contracting in the way that delivery drivers and cyclists are engaged.

The Fair Work Ombudsman, in documents filed in the Federal Court of Australia on 12 June 2018, alleges that in 2015 Foodora misled two bicycle delivery drivers, and one vehicle delivery driver, into believing they were independent contractors, rather than truly being employees of Foodora.

Under section 357 of the *Fair Work Act 2009* (Cth), it is unlawful to misrepresent a contract of employment as an independent contracting agreement. Even if a misrepresentation can be established, it is a defence to a contravention of section 357 if the employer can prove that the employer "did not know" or "was not reckless" as to whether the contract was one of employment rather than an independent contracting agreement.

Breaches of the legislation carry extensive penalties, while the additional requirement to compensate the affected workers for any unpaid wages, superannuation, leave or other employment entitlements can have disastrous effects on organisations.

To determine whether an arrangement between a worker and an organisation is one of independent contracting or employment, the common law "multi-factor" test, developed by the High Court of Australia in cases such as *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1 and *Hollis v Vabu Pty Ltd* [2001] HCA 44 is applied. That test requires the Court to consider a range of questions about different aspects of the relationship between an organisation and a worker, including:

- the degree and nature of control placed over the worker;
- whether the worker has the ability to delegate work to another person or organisation;
- the mode of remuneration;
- who has responsibility for the provision and maintenance of tools or equipment required to undertake the work; and
- the level of obligation the worker has to work for the organisation, and for no one else.

The Fair Work Ombudsman says that when they reviewed Foodora's arrangements with the three workers using the "multi-factor test", they concluded that the workers were actually employees, because, in their view:

- Foodora exercised a high level of control, supervision and direction over the workers' hours, location and manner of work;
- Foodora required the workers to wear a branded uniform, and use branded food storage boxes and/or bike racks;

- the workers were paid fixed hourly rates and/or fixed amounts per delivery, and the workers did not negotiate their rates of pay at any time; and
- the workers were not conducting their own delivery business, because they did not advertise or promote their own business, they did not delegate work to others, and they had no customer base, business premises or insurance.

Bicycle and vehicle delivery drivers have frequently been the subject of litigation as to whether they are engaged as independent contractors or employees by organisations. In previous decisions, such as the seminal decision of *Hollis v Vabu Pty Ltd*, the requirement to wear a uniform, and the fact that the courier company determined the method of remuneration and controlled what jobs the couriers took, were factors which pointed to the relationship being one of employment.

Foodora have not yet filed any defence in the proceedings, so it is unclear what their view will be on what the Fair Work Ombudsman has alleged. Foodora has sought further and better particulars of the Fair Work Ombudsman's claims, and has been ordered to file a defence in the near future.

On 2 August 2018, Foodora released a statement to announce that they are pulling out of the Australian market altogether. Whether such a move was already planned, or whether it comes as a consequence of the Fair Work Ombudsman proceedings (and perhaps also a separate unfair dismissal case currently pending before the Fair Work Commission), is unknown. How this "exit" from the Australian market will impact Foodora's response to the Fair Work Ombudsman litigation will also remain to be seen.

It is possible that Foodora, or other digital platforms, might argue that they are not contracting to receive work at all, but are simply supporting an independent business run by their drivers or riders – that is, they are simply the conduit through which the driver or rider can obtain and be paid for work in their own business. But however the case is ultimately argued, it seems likely that any court decision in this case will be important in assessing the status of workers in the "gig economy".

If your organisation engages independent contractors, but is uncertain whether the arrangements would stand up to this level of scrutiny, a member of Piper Alderman's national Employment Relations team will be able to assist.