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Article Information

Author: Tim Lange
Service: Employment & Labour

Driving to independence: Fair Work Commission finds ride-share drivers are not employees

In an Australia first, Uber has now had its ride-share app based business tested in the Fair Work Commission. In Kaseris v Raiser Pacific V.O.F [2017] FWC 6610, the Fair Work Commission held that drivers utilising Uber's ride-share application are not employees within the meaning of the Fair Work Act.

Background

Since 2010 the popular ride-share company, known as Uber, has operated across Australia. The Uber app, downloaded onto smartphone devices, allows drivers and passengers to connect to each other. There is a passenger app which facilitates a passenger's request to each driver and a driver app which allows drivers to accept or reject passenger's requests for a trip. Each driver (and passenger) is accorded a rating which can be increased or decreased based on feedback of the quality of services provided.

Services Agreement

Before a driver can accept fares through the Uber app, a services agreement must be entered into between each driver and Uber which sets out the terms and conditions governing the relationship between drivers and the company. Under the services agreement, a fee is paid by each driver to Uber for each trip completed by the driver.

The services agreement is utilised by Uber to set its expectations of drivers (such as minimum driver ratings and acceptance of trip rates) and establish its relationship to each driver (but not passengers). The services agreement goes to some length in identifying that it is the driver and not Uber who has the relationship with each passenger.

Driving to independence

In *Kaseris v Raiser Pacific V.O.F [2017] FWC 6610*, a driver applied for an unfair dismissal remedy claiming that he had been an employee of Uber and that he had been terminated from that employment unfairly. The driver's ability to use the Uber app to accept trips had been terminated by Uber because he had failed to maintain an adequate overall rating.

The crux of Uber's argument before the Commission was that the services agreement established a simple business relationship between the driver and Uber. That relationship consisted of Uber providing lead-generation services and other ancillary services such as payment and collection processing and customer support in return for payment of a service fee by the driver. The Commission member, Deputy President Gostencnik, found that Uber was more likely to be properly characterised as a transport industry participant, but that ultimately this did not change the view that it is the relationship between the driver and Uber that will determine whether there is an employment or independent contractor relationship.

The driver argued that if he were an independent contractor, he would have been able to charge a lower or higher rate for passenger trips at his discretion. The Commission took this into account but found it insignificant when weighed against the factors below.

The Commission approached the question of whether the driver was an employee by reference to the multi-factorial approach from *Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario* [2011] FWAFB 8307. In finding that the driver was not an employee, the Commission noted that:

- The driver was free to perform his work as much or as little and whenever he pleased.
- When providing rides to passengers, the driver did not do so in order to fulfil any contractual obligation placed on him by Uber.
- Uber did not make any payment to the driver for each trip in consideration for services provided by the driver. Instead, the driver was charged a service fee by Uber based on an agreed percentage of the fee paid by the passenger for each trip (i.e. the typical identifier of an employment relationship of the work-wage bargain was absent).
- The driver, not Uber, invested in the capital equipment necessary to provide the services (smartphone, wireless data plan, vehicle, registration, and insurance).
- The driver was not permitted under the services agreement to wear a uniform identifying Uber, nor have any Uber labelling within or on the outside of the vehicle he used to transport passengers in.
- The driver was required to be registered for GST and Uber had no taxation dealings with the driver.
- Uber did not pay superannuation contributions on behalf of the driver.

The above factors led the Commission to decide that the relationship was one of an independent contractor providing services and that the driver was not an employee. He was therefore unable to apply for an unfair dismissal remedy under the Fair Work Act.

The international approach

The driver sought to rely on the UK case of *Aslam and others v Uber B.V. and others* [2017] IRLR 4 (ET) (**Aslam**). In *Aslam*, the Employment Tribunal held that drivers using the Uber app were 'workers' for the purpose of the *Employment Rights Act 1996* (UK) (ER Act). However, the ER Act definition of an employee/worker includes a second limb in addition to employment. That second limb covers "workers" who would not be considered employees, and the *Aslam* decision was based on a finding that Aslam was a "worker" rather than an employee of Uber. Deputy President Gostencnik held that the UK approach was therefore of no assistance to the driver's case.

"Dependent" contractors and the broader gig economy?

As with the UK, there are some limited circumstances in which legislation provides for employment-like benefits to individuals who would otherwise be independent contractors. Typically this has been limited to certain owner-drivers and forestry contractors due to the nature of the work. This approach reached it height with the (now repealed) Road Safety Remuneration Tribunal which was empowered to set rates for very broad categories of owner-drivers, and continues to be strongly advocated for by various trade unions.

In response, various state governments are considering an approach in which the issue of gig economy workers more broadly might be subject to regulation along the same lines, and the model is fast becoming recognised as "dependent contracting".

Conclusion

Gig economy participants, and ride-sharing platforms more particularly, now have some clarity around how the Fair Work Commission, at least, will approach the issue of whether its partners are employees or independent contractors. The answer is that it will approach this in an orthodox way, unaffected (for now) by the legislative provisions which in other jurisdictions have led to a broadening of workers to whom employment-like entitlements are owed. However, the decision includes musing on the fact that current employee-employer principles are based on a traditional approach and then questioned whether this remains adequate in the current climate of expansive growth in the digital and sharing economy.

Employers operating in the digital and sharing space will find this decision useful but also should be attuned to the specific circumstances of this case. Business should assess the operation of their agreements and contracts with its service providers individually and if unsure, seek legal advice on whether employment relationships may be established.