

WHAT ARE FOOD DELIVERY DRIVERS - EMPLOYEES, INDEPENDENT CONTRACTORS OR NEITHER?

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There is no doubt that online food delivery platforms such as UberEats, Foodora, Deliveroo and Menulog have attracted the attention of Australians in the last few years.

By way of example, well favoured UberEats has had its platform grown to support over 30,000 restaurants in Australia and between August and December 2020 in Sydney alone, provided work to 9,389 delivery people.

This alternative for obtaining food, which has proved to be particularly convenient in the volatile COVID-19 environment that we currently face today, has coincided with the challenge of categorising the relationship of these drivers with such platforms.

There are ongoing sustained attacks on the contractor business model implemented by such food delivery services, and this has ramifications for ride sharing and other delivery services.

DIEGO FRANCO V DELIVEROO AUSTRALIA PTY LTD [2021] FWC 2818 (DIEGO)

Recently, the Fair Work Commission (FWC) was obliged to determine whether Mr Diego Franco was truly an employee of Deliveroo so that it maintained the jurisdiction to determine his unfair dismissal application pursuant to s 394 of *Fair Work Act 2009* (Cth) (FW Act).

In concluding that Mr Franco was in fact engaged as an employee of Deliveroo, it had regard to the following (among other) indicia:

1. Control: Deliveroo's control was evidenced by its ability to discipline and terminate riders for poor performance. The extent of such control overrode several factors which would ordinarily point toward an independent contractor relationship;
2. Presentation as part of the business: Mr Franco was expected to wear branded attire and use Deliveroo branded equipment; and
3. Working for competitors: while Mr Franco was expressly able to work for competitors, new technology has made it possible for individuals to work for two or more employers simultaneously.

AMITA GUPTA V PORTIER PACIFIC PTY LTD & ANOR; UBER AUSTRALIA PTY LTD T/A UBER EATS

[2020] FWCFB 1698 (GUPTA)

Ms Gupta's case within the FWC was unsuccessful and it was concluded (even on appeal to the FWC Full Bench) she was not an employee of Uber.

She sought judicial review of the FWC decision. On 27 November 2020, Bromberg, Rangiah and White JJ of the Federal Court of Australia (FCA) commenced hearing an appeal arising from the FWC decision which found that Ms Amita Gupta was not an employee of Uber Eats.

It would have been fascinating to see whether the FCA considered that the FWC should have entertained Ms Gupta's unfair dismissal application by virtue of her being an employee for the purposes of the FW Act. The matter was settled and the FCA will now not consider the matter until and unless a further case arises.

Although the outcome of the FCA proceedings was not determined, the transcript of the hearing has provided some interesting insight. What we know so far is that:

1. a multifactorial approach is to be adopted in determining the relationship between Ms Gupta and Uber Eats and that no single consideration will be determinative of the outcome;
2. it is important to assess whether Ms Gupta was operating in a business of her own or working in the business of Uber Eats; and
3. in response to the submissions advanced by Senior Counsel of Uber Eats that there was no obligation for Ms Gupta to carry out the contracted task, the FWC had some uncertainty in classifying her as an independent contractor let alone an employee.

The transcript of the initial court session indicate that the FCA may be sceptical of the written contractual arrangements between Uber and its drivers, and willing to pierce that contractual veil. It is not surprising that an apparently very large settlement sum was paid by Uber to Ms Gupta.

BACKGROUND TO GUPTA

The Diego and Gupta cases are definitely not the only cases which have sought to address the question of whether drivers are employees. By way of contrast, in the ride-hailing space, the FWC has heard several cases involving an individual's application for an unfair dismissal remedy. These have often been dismissed for want of jurisdiction.⁷

For example in *Janaka Namal Pallage v Rasier Pacific Pty Ltd* [2018] FWC 2579, the FWC considered the following indicia in making its determination that Mr Pallage was not an employee of Uber:

1. Rasier Pacific had relatively weak control of Mr Pallage;
2. no attention was drawn as to whether there was any relevant prohibition upon the capacity of Mr Pallage to perform work for others; and
3. the evidence before the FWC was that Mr Pallage was not paid a periodic wage or salary and that such payments as he received were reference to the completion of tasks.

NEW INDUSTRIAL AWARD?

The confusion surrounding the relationship between driver and online services platforms has resulted in Menulog taking steps by way of an application to the FWC pursuant to s 158 of the FW Act for the development of a new modern award covering the 'on demand delivery services industry'.

Relevantly, Menulog submitted that "The Proposed New Award would provide an industry appropriate foundation for minimum employment entitlements to adopt an employment model."

As this matter currently stands, interested parties have been invited to lodge written submissions to assist with the FWC's determination of establishing such award. Any decision reached by the FWC will be critical in informing the willingness and ability of these platforms to enable individuals engage in its service.

IMPLICATIONS FOR THE INDUSTRY

Businesses in the ride-hailing or online food delivery industry need to be cognisant that individuals may be considered employees for the purposes of affording them rights or protection under the FW Act.

The Courts and the FWC have made it clear that it will adopt a multifactorial approach in making a determination as to whether an individual is to be classified as an employee.

This has application to other delivery services, such as Amazon delivery drivers and ride sharing models such as Uber, Ola or GoCatch. This is an interesting space and we consider the pressure will only increase on providers regarding drivers status.

Janaka Namal Pallage v Rasier Pacific Pty Ltd [2018] FWC 2579; *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 480; *Kaseris v Rasier Pacific VOP* [2017] FWC 6610.

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GET IN TOUCH



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