The Employment Status of Delivery Riders in *Joshua Klooger v Foodora Australia Pty Ltd* in the Context of Employee-Creditor Prioritisation

The Fair Work Commission (the **Commission**) *recently determined an unfair dismissal claim by a former delivery rider for Foodora, an app-based meal delivery company.*[1] *It held that, despite the presence of contractual terms which sought to forestall the emergence of an employee/employer relationship between Foodora and delivery riders, those riders were actually employees. While an unfair dismissal case, this decision holds broader implications which warrant close attention by participants in the gig economy.*

Background

This decision comes in light of Foodora's entry into administration and its recent conclusion of a Deed of Company Arrangement (**DOCA**). The proceedings against Foodora were brought by Josh Klooger (with support from the Transport Workers' Union), who began working for Foodora in March 2016 and rose steadily in seniority. At the same time, he was running a scheme which he called the 'Josh Klooger Delivery Company', whereby other delivery riders would use his Foodora account details to make deliveries under his name, for which he took a small cut. The scheme began after Klooger's friend faced visa difficulties that caused Foodora to suspend his account. Initially it functioned without the knowledge of Foodora's management. Eventually, Foodora's management became aware of the scheme after it had widened to include three further riders. At this point, the Commission discovered that, rather than attempting to shut the scheme down, Foodora management 'commended [Klooger] for his entrepreneurial initiative'.

Meanwhile, Foodora had been considerably lowering the rates of pay received by its delivery riders from an initial base of $14 per hour, plus $5 per delivery made. By February 2018, its riders received $7 per delivery, with no hourly rate to accompany it. Klooger responded by appearing on a TV show, The Project, to protest the lowered pay. Three days later, Foodora demanded that he relinquish administrative controls over an online messaging group on the app, Telegram, which was used to communicate with the company's Melbourne-based delivery riders. Klooger did not comply with Foodora's demands, causing it to terminate his contract on 2 March 2018. In response, Klooger alleged unfair dismissal.

Distinguishing Employees and Contractors

In order for the Commission to have jurisdiction over an unfair dismissal claim, the individual making the claim must have been an employee of the entity against which they make the claim. Section 382 of the *Fair Work Act (2009)* (Cth) states:

> *A person is protected from unfair dismissal at a time if, at that time:*
>
> *(a) the person is an employee…*

However, the contract between Foodora and its delivery riders had been designed to militate against the possibility of those riders being treated as employees. Commissioner Cambridge was therefore charged with determining whether Klooger was indeed an employee of Foodora before he could proceed with considering the rest of the claim.

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[1] *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 ('*Klooger v Foodora*') <https://www.fwc.gov.au/documents/decisionssigned/html/2018fwc6836.htm>.

In doing so, he applied the 'multifactorial tests' set out in High Court judgments in *Stevens v Brodribb Sawmilling Co Pty Ltd*[2] and *Hollis v Vabu*[3] and Commission decisions in *Abdalla v Viewdaze Pty Ltd*[4] and *Cai (t/a French Accent) v Do Rozario*.[5] These tests are qualitative assessments of several factors representative of the nature of the relationship between the parties to determine whether that relationship is between independent contracting entities or an employer and employee.

The indicia Commissioner Cambridge applied closely tracked those used in earlier case law, including in *Vabu*, reflecting the fact that both disputes concerned the status of bicycle couriers and, as a result, shared some key factual characteristics. In particular, the Commission concluded —consistent with *Vabu* — that bicycle deliveries were not a skilled activity which might indicate the presence of an arrangement involving an independent contractor, apologetically noting that, '[w]ithout in any way being disparaging to cyclists, there was not a high degree of skill or training required to use or operate the bicycle in the performance of the delivery work.' Similarly, the absence of substantial capital investment in equipment pointed to an employer/employee relationship, as did the effect of uniformed delivery riders presenting an image to the public of being part of the Foodora business. Foodora's marketing materials describing its delivery personnel as '*our* couriers' reinforced this effect, according to the Commission.

The Commission observed that, while the language of the contract made obvious attempts to differentiate the delivery riders from employees, the document remained essentially similar to an employment contract. As in the Court's decision in *Vabu*, the Commission appeared to interpret Foodora's regular invoicing practices as being likewise indicative of the riders' status as employees. Further comparisons were drawn between the position of Foodora delivery riders and traditional employees in the procedures by which shifts were allocated, the fixed geographical setting in which riders worked, and the control that Foodora wielded over these matters through its batching system.

Foodora's batching system is one way it could be distinguished from other takeaway food delivery services, such as Uber Eats and Deliveroo. The system allowed Foodora to rate riders across several criteria, including their demonstrated willingness to work during peak periods and their history of no-shows, and determine how many shifts they were to be allocated. Commissioner Cambridge found that the batching system gave Foodora 'considerable capacity to control the manner in which [delivery riders] performed work' by forcing those riders who were motivated to seek ongoing work to accept shifts at particular times and to fulfil a minimum weekly shift count.

One particularly contentious factor was the possibility of 'delegation or sub-contracting' having occurred. Foodora contended that, because of the unique circumstances arising out of Klooger's substitution scheme (the Josh Klooger Delivery Company), the relationship could not have been one between an employer and employee, given that it is not normally the case that an employee could sub-contract their work out to others — rather, this was, in Foodora's submissions, the behaviour of a contractor. The essential problem with this line of argument was that the scheme functioned inconsistently with Foodora's own service contract, which explicitly ruled out sub-contracting without its management's prior written consent. The implicit consent of Foodora's management when upholding the scheme as a prime example of Klooger's creative business acumen came after the sub-contracting arrangements had already been made. Moreover, the scheme allowed individuals to work in circumstances which Foodora knew were not legal. As a result, the Commission decided that the scheme could not be used to ground an argument that,

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[2] (1986) 160 CLR 16
[3] (2001) 207 CLR 21
[4] (2003) 122 IR 215
[5] (2011) 215 IR 235

because individuals appeared to be sub-contracting, the delivery drivers were merely independent contractors, not employees.

Priority of Delivery Riders as Creditors

Foodora entered into voluntary administration in August 2018, claiming that doing so would provide it with 'breathing space' in the context of Klooger's claim before the Commission and simultaneous proceedings commenced by the Fair Work Ombudsman in the Federal Court.[6] This had the effect of making those delivery riders to whom money was owed by Foodora its creditors. On 16 November 2018, the company's creditors, including the delivery riders, elected to take up the offer of Delivery Hero, Foodora's German parent company, to place it under a DOCA.

Under Section 556 of the *Corporations Act 2001* (Cth), employees of a company enjoy higher payment priority than those creditors with unsecured interests in the company. Indeed, employees also have priority over those secured creditors whose interests are not secured against any particular property of the company, but are simply 'circulating security interests', held in relation to the company's assets in general. The operation of Section 556 entitles employees to prioritised payment of wages, superannuation contributions and superannuation guarantee charges. Amounts due to employees as injury compensation are to be paid out at the next level of priority, followed by those due in respect of leaves of absence governed by an industrial instrument and, finally, retrenchment payments. Importantly for this case, Section 444DA of the *Corporations Act 2001* (Cth) preserves this prioritisation where a DOCA is entered into in the absence of any agreement or court order to the contrary. The practical effect of this structure of payment priorities is that, when the company comes to pay its creditors, employees will be the first category of creditor to receive payment, apart from secured creditors with an interest in fixed assets.

As contractors the delivery riders would have been entitled to considerably less (only to any outstanding delivery payments not made at the point Foodora entered into administration). Additionally, their claims would have been as ordinary unsecured creditors, meaning that repayment of secured and employee debts would be prioritised ahead of them. To that end, the Commission's decision that Mr Klooger was an employee takes on special significance for the likelihood of delivery riders receiving payment of outstanding debts owed to them by Foodora. Nevertheless, the $3 million offer from Foodora's parent company under the DOCA was insufficient to cover the estimated $5.5 million in unpaid wages and superannuation owed to the delivery riders as employees. This means that, under the DOCA, the underpaid riders will not receive the full amount that they are owed.

Lessons from the Fair Work Commission's Decision

This decision, while significant in its implications for Foodora's former workers, situates itself firmly within existing case law on the criteria used to distinguish employees from contractors. Foodora's submissions raised a novel legal argument in contending that Klooger's substitution scheme evidenced a relationship between contracting parties. However, this argument was never likely to hold water because of its reliance on an arrangement which itself facilitated illegal activity. To the extent that the Commission relied on features unique to Foodora such at its batching system, there may be grounds to distinguish this case from other comparable food delivery operations, such as Uber Eats and Deliveroo. Interestingly, at the same time as this decision was handed down by the Commission, the High Court in the UK declined judicial review

[6] David Chau, 'Foodora enters into administration despite claims it was "solvent"', *ABC News* (online), 11 August 2018 <https://www.abc.net.au/news/2018-08-17/foodora-enters-into-administration/10133620>.

of a Central Arbitration Committee decision that UK-based food delivery company, Deliveroo, engaged with its riders on a contractual basis, rather than as employees.[7]

Ultimately, the Commission's decision does not depart from the guarded expectations that those who are familiar with Court decisions in cases such as *Vabu* should hold. Insofar as individuals are providing unskilled labour under a contract specifying reasonably regular hours, wearing uniforms and displaying company branding, and operating in a way substantially controlled by the company using their services, courts are inclined to treat them as employees. This distinction is highly significant for firms which might not want to assume the tax liabilities, superannuation complexities, workers' compensation obligations and vicarious liability brought on through employment contracts. Indeed, the Commissioner noted that, where there is 'considerable potential to lower, avoid or obfuscate legal rights responsibilities or statutory and regulatory standards', those structures 'should be subject to stringent scrutiny'.[8]

In order to avoid falling foul of the law, companies intending to deal with individuals on the basis that they are contractors rather than employees should consider the following:

- are the individuals substantially in control of their working hours?
- even if those individuals are ostensibly in such a position of control, are there other features of their relationship with the company which mean that, in a practical sense, the company retains significant centralised control over their hours?
- does the company have considerable control over the geographical setting in which individuals work in a practical sense?
- to what extent are individuals simultaneously able to work for the company's competitors? Do requirements around uniforms or the display of company liveries affect this ability?

The Foodora case demonstrates that any company seeking to exploit the benefits of using independent contractors rather than employees walks an extremely fine line and should be aware of the risks of a business model reliant on being able to do so.

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[7] Sarah Butler, 'Deliveroo riders lose high court battle to gain union recognition', *The Guardian* (online) 6 December 2018 <https://www.theguardian.com/business/2018/dec/05/deliveroo-riders-lose-high-court-battle-gain-union-recognition>.
[8] *Klooger v Foodora* (n 1) [106].