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LawTalk Blog



The 'gig' economy - what are workers' entitlements?

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There has been an increase in workers choosing flexibility over job security by participating in the gig economy, where workers are paid per 'gig' they undertake.

What are 'gigs'?

Some of the most well-known 'gigs' include:

- Ridesharing, using platforms such as [Uber](#) and [Ola](#)
- Food Delivery, using platforms such as [Uber Eats](#) and [Deliveroo](#)
- Skilled freelance work, using platforms such as [Airtasker](#) and [Fiverr](#)

Positives and negatives of gig economy

Workers who have pre-existing commitments, for example family or other work, are able to choose gigs that will work for them. This flexibility, together with digital platforms providing increased accessibility, is why we have seen an increase in workers participating in the gig economy.

While workers in the gig economy can enjoy having control over when they work, the trade off is usually job security and protection from exploitation - this is because, generally, they are considered to be independent contractors and not employees. Independent contractors do not have to be paid the minimum statutory or award rate and they do not get paid leave and superannuation contributions.

What is the difference between an employee and an independent contractor?

An employee is a worker who works for an employer, while an independent contractor is a worker who works for themselves. While these definitions seem straight forward, in practice they are usually not.

A multi-factor test has been developed by case law to provide guidance as to whether a worker is an employee or an independent contractor. The test is made up of factors called 'indicia'. There is no set number of indicia that have to be satisfied to determine whether a worker is an employee or independent contractor – the indicia are there to help examine the relationship between the parties.

Some of the most common indicia:

- Is the worker performing the work as directed by their employer or do they have a high level of autonomy?
- Does the worker have standard or set hours given by their employer or does the worker have the scope to negotiate when they work?
- Is the worker engaged on an ongoing basis or are they only engaged for a specific gig?
- Does the worker or the employer bear risk? For example, who is taking the financial risk and who bears the liability for poor work?
- Does the employer pay superannuation or is the worker paying their own superannuation?
- Does the worker supply their own tools and equipment or is this provided by the employer? Is the worker provided with a uniform with a logo or the company's colours?
- Does the worker pay their own tax and GST to the Australian Tax Office or is income tax deducted by the employer?
- Does the worker get paid regularly or do they submit an invoice for each task?
- Is the worker entitled to paid leave?

As you may glean from the indicia, generally workers operating within the gig economy are considered independent contractors.

Legal cases in gig economy

Kaseris v Rasier Pacific V.O.F [2017] FWC 6610

Mr Kaseris was an Uber driver who's driving account was deactivated due to low ratings. Mr Kaseris' lodged an unfair dismissal application alleging he was an employee of Uber and as such should be protected from unfair dismissal.

Ultimately the Fair Work Commission held that Uber drivers are independent contractors and therefore are not protected from unfair dismissal. The Commission came to this decision after considering the following indicia:

- Mr Kaseris had a high level of control over how he performed the work. He was able to choose when he worked, how long he worked and whether he would accept trips.
- Mr Kaseris used his own vehicle and smart phone and carried the costs of same.
- Mr Kaseris was not required to wear a uniform and was not permitted to display Uber's logo or colours.
- Mr Kaseris had to obtain an ABN and pay his own tax and GST to the Australian Tax Office.
- His income was a share of the fees for each trip and that income was not considered to be subject to PAYG tax.

Mr Kaseris argued that he must be an independent contractor because he could not charge whatever fare he wanted in accordance with the Services Agreement between himself and Uber. The Commission did consider this but found the indicia suggesting Uber drivers were independent contractors outweighed this indicia.

Klooger v Foodora Australia Pty Ltd [2018] FWC 6836

In this landmark case, workers were found to be employees of [Foodora](#).

Mr Klooger, who was dismissed from his job as a food courier for Foodora for allegedly breaching intellectual property rights by not withdrawing administration rights of a chat group set up by Foodora upon Foodora's request. Mr Klooger argued that the substantive and operative reason for his dismissal was that he had spoken out about the poor conditions that Foodora's food couriers were subject to, which together with the process undertaken to dismiss him made his dismissal unfair.

Foodora argued that Mr Klooger was not an employee and therefore was not protected from unfair dismissal. The Fair Work Commission found that Mr Klooger was an employee. In this matter, the following indicia were considered:

- Foodora exercised a high level of control, supervision and direction over Mr Klooger as they dictated his shift start and finish time and what location in which he would work.
- Mr Klooger was required to wear a uniform with a Foodora logo and use branded equipment provided by Foodora.
- Mr Klooger was paid a fixed hourly rate and then was paid an additional amount for each delivery he made.
- Mr Klooger did not have a separate place of work and did not advertise his food couriership services elsewhere.

The decision led to a claim for underpayment, as Mr Klooger (and his colleagues) were getting paid below the relevant award rate.

Legal considerations for gig workers

It is important to know whether you are an employee or an independent contractor and what you are entitled to. Employers that treat employees as independent contractors are engaging in sham contracting, which can lead to penalties for the employer and potentially the recovery of entitlements for the worker.

If you plan to engage in the gig economy, you may want to seek legal advice. Andersons Solicitors has a highly skilled team of employment lawyers led by [Margaret Kaukas](#). If you have any questions in relation to your employment please do not hesitate to

[contact Andersons Solicitors.](#)

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