SQUIRE PATTON BOGGS

# Workplace View

February 2018

## *Uber* Unfair… Are Drivers Being Taken for a Ride?

***Jane Silcock, Senior Associate and Anna Elliott, Partner***

*Would you describe Uber as a transport services provider? What about a technology-based business that supplies lead-generation software?*

*Confused? Read on.*

The legal status of Uber drivers has not previously been tested in Australia, until now. In the recent unfair dismissal case of *Mr Michaeil Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610, the Fair Work Commission (**FWC**) was asked to determine, as a threshold issue, whether an Uber driver was in fact an employee of Uber, and therefore permitted to proceed with his unfair dismissal application.

### The Arguments

The driver argued that, having entered into a services agreement with Uber, he had subsequently been "dismissed" when Uber terminated the agreement by deactivating his access to its "Partner App" (its smartphone app for drivers) on 11 August 2017. Uber did this because the driver had not met Uber's service standards, having failed to maintain an adequate overall rating.

Uber claimed that the contractual arrangement between Uber and the driver could not result in an employment relationship for various reasons, including that it did not give rise to a "wages-work bargain". That is, an obligation on the one side to perform work or services under a contract and, on the other side, to pay for that work or services.

Rather, Uber claimed that the driver's agreement recorded a simple business arrangement. In return for the driver paying Uber a service fee, Uber provided "lead-generation services", as well as other ancillary services, such as payment and collection processing and customer support services.

### The Decision

In considering the status of the legal relationship between Uber and the driver and applying the traditional, multi-factor test, the FWC found that the driver:

- Was not required to perform any work or provide any services for the benefit of Uber
- Provided his own capital equipment and maintained his own vehicle registration and insurance
- Had "complete control" over the way in which he conducted the services provided by him
- Provided transportation services to riders when, where and for whom he saw fit, without any further reference to Uber
- Was not required to wear a uniform or display Uber's name, logo or colours on his vehicle
- Was not performing an contractual obligation owed to Uber by providing transportation services to riders
- Did not receive any payment from Uber for the provision of any work or services (although the driver was charged a "service fee" in respect of services provided by Uber to the driver)

Indeed, in describing the nature of the relationship between Uber and the driver, the agreement itself stated that their relationship was limited to Uber providing technology services (i.e. the Uber app) and acting as a "payment collection agent". In keeping with that assessment of its core function, Uber contended that it is, "in no way affiliated with providing transport services in Australia".

This, the FWC noted, was consistent with arguments made by Uber in similar proceedings in the US District Court, although in those proceedings, Uber's description of itself as a "technology company" was criticised on the basis that "Uber does not simply sell software; it sells rides". However, notwithstanding that assessment (which is not binding on the FWC), the FWC found that, using the "multi-factor" approach adopted by Australian courts and tribunals to assess whether an engagement gives rise to a relationship of employment or one of independent contracting, an employment relationship simply did not arise on the facts.

That finding meant that the Uber driver was unable to pursue his application for an unfair dismissal remedy.

### What Will the Future Hold?

In coming to that conclusion, the FWC did at least recognise that the traditional legal approach (used to determine whether a relationship of employment or principal and contractor is said to exist) was developed prior to the modern "gig economy". As a result, it was noted that the legal principles used to differentiate such relationships will need to undergo some degree of evolution in order to keep pace with new and developing modes of work.

In acknowledging this case, the Fair Work Ombudsman, Natalie James, recently commented that her officers will continue to apply the traditional approach, and that our system has not evolved to deal with new forms of work. It should also be noted that the Uber driver in this case was unrepresented and the decision was that of a single Commissioner in the Fair Work Commission. As such, the decision may not deter future applications by "gig workers" whose engagements are terminated.

It is positive to note that the issues canvassed in this decision are however being considered more broadly, both in Australia and abroad. The UK's recent Taylor Review considered modern ways of working and the Australian Senate's Select Committee on the Future of Work and Workers is currently receiving submissions on this topic. Interestingly, Uber has submitted that the legal distinction between employees and independent contractors is preventing it from offering training and other benefits to drivers.

As such and until things change, remember to give your Uber driver a good rating where deserved!

## Employer Reminder

### Labour Hire Licensing in South Australia and Queensland

***Jessica Geelan, Associate***

As reported in our December 2017 edition of Workplace View, labour hire licensing will commence on 1 March 2018 in South Australia and on 16 April 2018 in Queensland. The schemes aim to protect vulnerable workers and will apply to all "labour hire providers" **operating** in South Australia and Queensland, regardless of whether their business is registered in another state.

A "labour hire provider" is broadly defined and includes a person or business that supplies workers to do work for another person. The application is extremely broad and the regulations, which are purported to exclude certain arrangements, are yet to be finalised.

Significant penalties will apply to labour hire providers operating without a licence, as well as employers who engage an unlicensed operator (subject to certain exemptions). Businesses that use labour hire arrangements in these states should consider safeguarding themselves by seeking the assurances in contractual arrangements with labour hire providers that they are properly licensed.

It is expected that Victoria and other Australian states will implement their own forms of labour hire licensing in the near future, which will likely impact global and national recruitment and staffing companies with operations across Australia. Watch this space for further updates.

## Did You Know?

**… Casual workers engaged on successive fixed term contracts may be eligible to bring an unfair dismissal claim if they work regular patterns of hours on an ongoing basis for the minimum employment period, even on different assignments.**

***Jessica Geelan, Associate***

In *Smith v Goldfields People Hire Pty Ltd ATF Goldfields People Hire Trust T/A GPH Recruitment* [2017] FWC 6730, a casual labour hire employee who worked regular rosters on two five-month long assignments, was determined by the Fair Work Commission (FWC) to be eligible to bring an unfair dismissal claim.

Under the *Fair Work Act 2009* (Cth), casual employees can only claim unfair dismissal if they have worked on a regular and systematic basis for more than six months (or 12 months with a small business employer), and show they have a reasonable expectation of continuing employment on that basis.

In this case, the FWC found that "an expectation of continuing employment is not the same as an expectation of permanent employment" and the fact the employee knew he was working "on assignment" did not mean he could never have expected his employment to continue. The FWC found he was employed on a regular and systematic basis with a reasonable expectation of ongoing employment and allowed the unfair dismissal claim to proceed.

To minimise the risk of unfair dismissal claims, employers should ensure casual on-hire employment contracts provide certainty and limitations around when the specified task or placement ends and manage any expectations of continuing employment.

## Migration Alert

### Recent Welcome Guidance for Some Existing Subclass 457 Visa Holders Aiming for Permanent Residence After March 2018

***Andrew Burnett, Of Counsel (MARN 1174849)***

Since 18 April 2017, some members of the cohort of 457 class employees who held or had applied for the working visa at that date (**Existing Holders**) have faced uncertainty regarding their eligibility for PR in the future, namely those who:

- are likely to have turned 45 by the time the required two-year period of employment with their sponsor has passed; and
- where commercial transactions have changed the structure of their employer.

In mid-January 2018 the Department of Home Affairs released a policy providing guidance for Existing Holders.

#### Age Requirement

Though the eligibility age for PR has decreased from 50 to 45, this policy confirmed Existing Holders turning 45 remain eligible for PR through the TRT stream.

#### Sponsor Restructure

Existing Holders whose Standard Business Sponsor (**SBS**) undergoes a restructure, takeover sale or closure, must have worked two years with the "same employer". A changed entity may be considered the "same employer", if there is a "connection" between the most recent SBS and any previous SBS of the nominee. This can be demonstrated if:

1. **They are still working in the same position** – i.e. they still perform the same duties and have retained the same working conditions throughout the two year period;
2. **They still report to the same management structures**; and
3. **The nominator retained the same business name and/ or operations of the former SBS but is considered a new legal entity.**

## OSH Alert

### Fair Work Commission Supports Reliance on Australian Standards in Considering Integrity of Drug Test Results

***Renae Harg, Associate***

A recent decision of the Fair Work Commission has highlighted issues for employers if they fail to comply with relevant Australian standards when drug (or alcohol) testing employees.

In *Harding v MMG Australia Limited* [2018] FWC 594, the Commissioner said the failure by the employer to comply with the Australian and New Zealand Standard (AS/NZS 4308:2008) in relation to urine sample drug testing meant that confidence in the testing process and the integrity of the process "could not be taken for granted." The Commissioner said complying with the Australian Standard went further than a statement of intent in a drugs and alcohol policy.

The Commissioner said he had to undertake a "rigorous consideration of the integrity of the test results" to establish whether the urine sample result was accurate. He said if the sample had been taken in accordance with the Australian standard, there would be no question about the integrity of the sample.

Employers should strongly consider using the relevant Australian standards when testing employees for drugs or alcohol to ensure the integrity of the results can be readily relied on.

## Legislation Alert

### Superannuation Uncovered!

***Renae Harg, Associate***

The Turnbull government has recently proposed draft legislation to increase penalties for employers who fail to pay superannuation. Significantly, where employers fail to comply with directions to pay superannuation, the Australian Taxation Office (ATO) will be able to apply for court ordered penalties, which include fines and/or up to 12 months imprisonment. The ATO can also require employers to undertake an approved course in relation to superannuation if it considers there has been a failure to comply with a superannuation obligation.

Employers with 20 or more employees are required to use the Single Touch Payroll system from 1 July 2018. The draft legislation proposes to extend this requirement to all employers by 1 July 2019. The "Single Touch" system requires employers to send the ATO taxation and superannuation information directly from their payroll system, which results in the ATO having greater visibility over employee entitlements.

The draft legislation is open for submissions until 16 February 2018.

## Events Update

### Squire Patton Boggs Labour & Employment Seminar Series

Our Labour & Employment Practice Group is holding the first seminar in its Labour & Employment Seminar Series, on the topic "Not in My Backyard! Are All Workplace Sexual Harassment Claims Coming Out of the Closet?"

- **Sydney – 8 a.m. registration/breakfast** (for a **8:30 a.m. start**) **on Thursday 15 February 2018** at Squire Patton Boggs Sydney office, Level 17, 88 Phillip Street, Sydney. Presented by Anna Elliot (partner) and Jane Silcock (senior associate).
- **Perth – 5 – 6 p.m. Seminar** and **6 – 7:30 p.m. Networking drinks on Thursday 22 February 2018** at Squire Patton Boggs Perth office, Level 21, 300 Murray Street, Perth. Presented by Bruno Di Girolami (partner) and Dominique Hartfield (of counsel). Optional **employment advice clinic** (20 minute allocations) **4 – 5p.m**.

During this seminar, we will discuss practical tips and solutions to the following common questions:

- Which kinds of behaviours and conduct will constitute sexual misconduct?
- What are the obligations of employers?
- How can my organisation create and reinforce a positive workplace culture?
- What is the best approach to effectively respond to and address complaints of sexual misconduct?
- What can my organisation do to mitigate the risk of future claims?

We will also take a look at recent and milestone cases to demonstrate the types of claims that are made and the nature of the remedies being awarded by courts and tribunals.

Should you have any queries or wish to register for any of the above events, please do not hesitate to contact Danielle Bova (Sydney) on +61 2 8248 7851 or Rosalie Cote on +61 8 9429 7683 (Perth).

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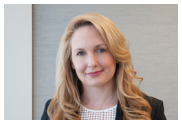

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