[2021] FWC 2818 [Note: An appeal pursuant to s.604 (C2021/3221) was lodged against this decision - refer to Full Bench decision dated 13 August 2021 [[2021] FWCFB 5015] for the result of the appeal.]

FairWork Commission

DECISION

Fair Work Act 2009
s.394 - Application for unfair dismissal remedy

Diego Franco

v

Deliveroo Australia Pty Ltd
(U2020/7066)

COMMISSIONER CAMBRIDGE SYDNEY, 18 MAY 2021

Unfair dismissal - employee or contractor - relationship found to be employment rather than independent contractor - no valid reason for dismissal - absence of procedural fairness - dismissal harsh, unjust, and unreasonable - reinstatement ordered.

[1] This Decision involves an application for unfair dismissal remedy which has been made under section 394 of the *Fair Work Act 2009* (the Act). The application was made by *Diego Da Silva Franco* (the applicant or Mr Franco). The respondent has been identified to be *Deliveroo Australia Pty Ltd ABN: 73 607 915 640* (the respondent or Deliveroo).

[2] The application was filed at Sydney on 21 May 2020, and it indicated that the date the applicant's dismissal took effect was 30 April 2020. Consequently the application was made within the 21 day time limit prescribed by subsection 394 (2) (a) of the Act.

[3] The applicant has been represented by the *Transport Workers' Union of Australia* (TWU). On 10 June 2020, Deliveroo filed a Form F3 – Employer Response to Unfair Dismissal Claim, which indicated that, at that time, it did not have a representative. The Form F3 identified jurisdictional objections to the application on the basis that; (a) the applicant was not an employee of Deliveroo but instead, an independent contractor, and (b), the applicant was not dismissed.

[4] On 22 June 2020, conciliation of the matter occurred but the claim for unfair dismissal remedy was not resolved. On 30 June 2020, the Fair Work Commission (the Commission) conducted a Pre-Hearing Conference during which Deliveroo maintained its jurisdictional objections to the application on the basis that the applicant was not an employee and that he had not been dismissed.

[5] During the Pre-Hearing Conference held on 30 June 2020, the Commission granted permission, pursuant to s. 596 of the Act, for the Parties to be represented by lawyers or paid agents. Further, the Commission issued Directions for evidence and other material to be filed and served in preparation for a Hearing which would deal with both the jurisdictional

objections that had been identified by Deliveroo, and the substantive claim for unfair dismissal remedy.

[6] Subsequently, the Hearing of the matter has been conducted in Sydney, over three separate days, 20 October, 23 November 2020, and 22 February 2021. At the conclusion of the proceedings on 22 February 2021, the Parties were provided with a further short period for filing additional submissions which concluded with the applicant filing concluding submissions on 8 March 2021.

[7] At the Hearing, Mr P Boncardo, barrister, appeared for the applicant together with Ms Owens-Strauss from the TWU. Mr Boncardo called the applicant as the only witness to provide evidence in support of the unfair dismissal claim. Mr M Felman, barrister, instructed by *MinterEllison* lawyers, appeared via video link for Deliveroo at the Hearing. Mr Felman called one witness, Deliveroo's Operations Supply and Support Manager Australia, Ms Emma Louise Pratt who provided evidence on behalf of Deliveroo.

Factual Background

Commencement

[8] The applicant, Mr Franco, is a Brazilian national who arrived in Australia on Christmas Day 2016. On 10 April 2017, Mr Franco made an online application to provide services to Deliveroo. Mr Franco provided various details in the online application form which inter alia, indicated that he owned a motorcycle, and therefore his application was progressed into the Sydney motorcycle/scooter application stream of Deliveroo. On 13 April 2017, Deliveroo sent an email and text message to Mr Franco which notified him that his application to be a supplier had been accepted, and that he was next required to complete an online quiz. Following the successful completion of the online quiz and the provision of further information, Mr Franco was provided access to a link which enabled him to establish his personal Deliveroo rider account.

[9] On 18 April 2017, Mr Franco electronically signed a Deliveroo supply agreement (the 2017 supply agreement). Upon receipt of the signed 2017 supply agreement, Deliveroo automatically sent an email to the applicant requesting that he book into an "onboarding" session. On 19 April 2017, Mr Franco attended an onboarding session at Deliveroo premises located at William Street, Darlinghurst, Sydney. At the onboarding session, Mr Franco (and others) was provided with information including; how to use the Deliveroo Rider App; where services could be performed; requirements in respect of safe operation of the performance of services, together with an offer to be provided with Deliveroo branded clothing and related equipment. Mr Franco accepted the offer to be provided with the Deliveroo branded clothing and related equipment for which a bond of $220 in total was subsequently deducted by way of $55 instalments taken from his first four fortnightly payments.

[10] Mr Franco commenced performing services for Deliveroo on 22 April 2017, when he made his first delivery using a Honda CB 125 cc motorcycle that he had purchased for $1500. Mr Franco continued to regularly perform delivery services for Deliveroo up until his services were terminated with effect on 30 April 2020. Mr Franco purchased a second motorbike, a Kawasaki 650, in 2018, and this machine was also used from time to time to perform delivery services. The two motor bikes were also used more generally as the only means of private transportation that Mr Franco had for himself and his family.

[11] At around the same time that Mr Franco commenced performing services for Deliveroo, April 2017, he also signed up to provide services for the Portier Pacific Pty Ltd company via the Uber Eats Partner App. However, Mr Franco did not commence to undertake delivery services for Uber Eats until 6 April 2018. Mr Franco performed what might be described as supplementary delivery work for Uber Eats, and from March 2020, he also performed work for the Door Dash delivery business.

The Deliveroo Delivery System

[12] The delivery services that were performed by Mr Franco for Deliveroo were arranged and undertaken by means of various computer-based applications or apps, which were accessed via the use of smart phones and/or other mobile electronic devices. The delivery services involve restaurants and other food and beverage suppliers advertising their products on Deliveroo's website or smart phone app, known as the Deliveroo Customer App.

[13] A customer seeking to purchase a food or beverage product places an order for that product using the Deliveroo website or the Deliveroo Customer App. Once the order has been accepted, (typically by a restaurant), the customer is notified that the restaurant is preparing the order, the customer is then charged the cost of the product and a delivery fee using the payment method that they have established with Deliveroo. At the same time that the order has been accepted and payment obtained, an algorithm developed by Deliveroo (the Frank algorithm) assesses which of the riders who have logged in via the Deliveroo Rider App are able to make the most efficient delivery of the order.

[14] A notification is then sent to the rider who has been assessed by the Frank algorithm as essentially the most (potentially) efficient delivery provider, and that rider is offered the delivery. The rider is informed of the restaurant location but not usually provided with the customer location until they collect the order at the restaurant. The rider must either accept or reject the delivery order within 100 seconds of the notification offer for the order. If the rider rejects the delivery order or does not respond within 100 seconds, the system then offers the delivery order to the next rider selected by the Frank algorithm.

[15] Once a rider has accepted a delivery order, the system provides a suggested route for the rider to take to the restaurant using Google Maps. When the rider approaches the restaurant, the system notifies the customer that their order is being collected. Upon collection of the delivery order at the restaurant, the rider then inputs a "*collected*" message on the Deliveroo Rider App, the rider is then provided with the customer's location and again a suggested route using Google Maps is provided to the rider. After the rider has delivered the order to the customer the rider inputs a "*delivered*" message on the Deliveroo Rider App. The rider is then able to receive notification for the next offer of a delivery order.

[16] A rider can choose to accept or reject any delivery order that is offered to them. Further, after a rider has accepted a particular order, they are able to reject any completion of the order by unassigning themselves from the order. In many instances, a request to unassign from an order may occur when the rider reaches the restaurant. At this point in the delivery process, the rider may identify some aspect of the completion of the delivery order that is undesirable. For instance, the rider may identify a long delay with the preparation of the order at that particular restaurant, or they discover that the customer delivery address is unsuitably too far away.

[17] In the event that a rider seeks to unassign themselves from a delivery order they communicate electronically via a live chat message platform with the Deliveroo rider support/live team. A rider seeking to unassign themselves from a delivery order will message Deliveroo rider support via the live chat message platform and request that they be unassigned from the order. The Deliveroo rider support member will seek an explanation for the request to unassign, but they will not refuse such a request. It should be noted however that a rider is unable to receive another delivery order offer until they have been unassigned from the current delivery order.

Zones and the Rider Engagement Systems

[18] In a city such as Sydney, Deliveroo has established geographical delivery areas or zones. Mr Franco initially indicated that he anticipated conducting deliveries in the Sydney Glebe (SYGB) zone, and in November 2017, he advised Deliveroo that he also wished to undertake deliveries in the Sydney Marrickville zone (SYMV). Riders are able to perform work in zones of their choosing by logging into the Deliveroo Rider app whilst located in a particular zone.

[19] Restaurant zones are permanently fixed and determined by the location of the restaurant. The zones for riders and customers change and will be determined by the location of the rider and customer at the time at which a delivery order is placed and actioned. Deliveroo has permitted riders to log into any zone or zones of their choosing and the Frank algorithm logically attempts to allocate delivery orders in and around the zone or zones that a particular rider has logged into.

[20] In April 2017, Deliveroo operated a rider engagement system called Staffomatic which allowed its Sydney riders two options for engagement. Riders could book sessions in advance indicating their availability for a particular time and a particular zone or zones, or they could "freely" log into the Deliveroo Rider App without giving any prior warning to Deliveroo that they were available to be offered delivery orders at that time and in that zone or zones. Mr Franco did not utilise the advanced booked session option of the Staffomatic system but instead he arranged engagements by utilising the free login method. Deliveroo did not stipulate the length of time that any rider remained logged into the Deliveroo Rider App whether they had booked the session in advance or freely logged in.

[21] Between 18 February 2018 and 21 January 2020, in Sydney, Deliveroo replaced the Staffomatic engagement system with a self-service booking system referred to as SSB. SSB was an engagement system designed by and for Deliveroo which sought to match anticipated customer demand with rider supply in particular zones and at particular times. The SSB system removed the free login option that was previously available under the Staffomatic system and riders were required to book sessions in advance (other than in the CBD zone). The SSB system anticipated the number of riders needed in particular zones at particular times, and it then offered riders the opportunity to book their availability for a particular time and in a particular zone, up until a limit of riders was reached, after which no other riders would be able to book or freely log into that particular time and zone.

[22] The SSB system established a priority basis for rider engagements which used individual performance factors such as, the attendance rate of the rider, the number of late cancellations of less than 24-hours' notice that a rider had made, and the rider's preparedness to participate at times of peak demand. These performance factors, or metrics, were used to rank an individual rider who would then be allocated into a segment. The SSB system allowed riders who were ranked in the higher order segments, to book sessions in advance before riders who were ranked in lower segments. For example, segment 1 riders were granted access to book sessions in advance from 11 am on Mondays, while segment 2 riders did not get access to book sessions until 3 pm, and segment 3 riders did not get access to book sessions until 5 pm. The earlier a rider could log in to book a session, the more likely they would be to obtain their preferred time for engagement.

[23] On 21 January 2020, Deliveroo ceased operation of the SSB system in Sydney. Riders such as Mr Franco were then able to freely login and make themselves available for engagement without any obligation to book in advance.

The Supply/Supplier Agreements

[24] The 2017 supply agreement that Mr Franco executed in April 2017, was replaced when on 2 October 2018, he executed a 2018 supplier agreement. The most significant aspect of the 2018 supplier agreement involved the permanent move to payment of variable rather than fixed fees for completed deliveries. Subsequently, on 9 December 2019, Mr Franco executed a 2019 supplier agreement which operated on and from 12 December 2019, until the termination of his services with Deliveroo.

[25] Although each of the 2017, 2018 and 2019 supply/supplier agreements are different, the essential elements in respect to Mr Franco's engagement to perform services for Deliveroo are, in broad terms, consistent throughout each document, with there being some alteration to particular terminology and detail. The 2019 supplier agreement operated at the time of the termination of Mr Franco, and it contained and reflected the essential elements found in the earlier agreement documents.

[26] In summary, the 2019 supplier agreement contained essential elements which stipulated that Mr Franco was a supplier in business on his own account, and that he was free to provide services personally or through any delegate. Further, the 2019 supplier agreement stipulated that Mr Franco was not obliged to do any work for Deliveroo, was free to choose when and wherever he worked, was free to work for any third party, including any competitor(s) of Deliveroo, and he was required to provide his own mobile phone and vehicle for the purposes of providing the services mentioned in the supplier agreement.

[27] The 2019 supplier agreement also required the payment of an administrative fee from Mr Franco to Deliveroo for the provision of administrative services including access to proprietary software and preparation of invoices. In addition, the 2019 supplier agreement required Mr Franco to complete services within a reasonable time period and in a safe and efficient manner, and that he was responsible for his own tax and insurance arrangements. However, Deliveroo also provided certain insurance cover. Termination of the 2019 supplier agreement by Mr Franco could occur at any time, for any reason, by way of immediate notice in writing, and by Deliveroo at any time, for any reason, with provision of one week's notice in writing.

Termination

[28] Deliveroo periodically reviewed the provision of delivery services provided by individual riders and relevantly identified any aspects of what it considered to be poor or inadequate performance. Two particular aspects of Mr Franco's performance of delivery services were the subject of recorded complaint and warning.

[29] Firstly, a circumstance where an order has not been received, but the rider has marked the order as delivered, is an event that was described as an Order Marked Delivered, Not Received (OMDNR). When an OMDNR event is identified, Deliveroo will send an email to the relevant rider indicating that their supplier agreement may be jeopardised by the identified OMDNR event. If a second OMDNR event occurs within 21 days of a previous OMDNR, Deliveroo would investigate the matter, and in all likelihood terminate the rider's supplier agreement. On 19 October 2017, 22 February 2018, 4 February 2019, and 22 January 2020, Deliveroo sent emails to Mr Franco identifying an OMDNR event on each occasion, and provided warning about the potential for that event to lead to the termination of his supplier agreement.

[30] Secondly, Deliveroo regularly reviewed its delivery time records in order to identify any significant delays in the provision of its delivery services to customers. In such reviews Deliveroo initially compares the difference between what it refers to as the expected rider experience time (Average RET) and the actual rider experience time (Actual RET). Deliveroo's data analytics software compares the gap (known as the "delta") between the Average RET and the Actual RET for an individual rider. The individual rider's delta is then compared to the average delta for other riders in the same zone using the same type of vehicle. If, upon this comparison, a particular rider's delivery time is considered to be unacceptable, a further investigation would be undertaken, and ultimately termination of supplier agreement may follow.

[31] On 3 February 2020, Deliveroo's weekly RET analysis showed that in the two previous weeks, Mr Franco's average Actual RET was between 10 and 30% slower than comparable riders in the relevant zones. Consequently, on 3 February 2020, Deliveroo's Operations Supply and Support Manager, Ms Pratt, sent an email to Mr Franco which warned him that his supplier agreement may be terminated because of the identified delays with his delivery times.

[32] In April 2020, Deliveroo undertook a review of rider accounts that were associated with customer complaints. This review resulted in inter alia, the identification of Mr Franco as a rider having significantly delayed delivery times. Ms Pratt conducted a further detailed investigation into Mr Franco's Expected RETs when compared with his Actual RETs. Ms Pratt determined that Mr Franco's delivery times were unacceptably delayed, and she decided to terminate his 2019 supplier agreement.

[33] On 23 April 2020, Deliveroo sent an email to Mr Franco which advised inter alia, that because he was failing to deliver orders in a reasonable time, he had breached the supplier agreement, and therefore 7 days' notice of termination of the agreement was provided. In a subsequent email exchange, Mr Franco unsuccessfully sought to persuade Ms Pratt to reconsider the decision to terminate his supplier agreement. Mr Franco performed his last delivery order for Deliveroo on 29 April 2020, and on the following day, 30 April 2020, his access to the Deliveroo Rider App was disabled.

[34] Following his termination with Deliveroo, Mr Franco continued and increased his supplementary delivery work for Uber Eats, and he also increased deliveries for another delivery company, Door Dash Technologies Australia Pty Ltd, with whom he had commenced engagements in March 2020. Mr Franco also obtained income from MKB Hospitality Pty Ltd after Deliveroo terminated his services with effect from 30 April 2020. Mr Franco has sought reinstatement, continuity of service and backpay, as remedy for his alleged unfair dismissal.

The Case for the Applicant

[35] Mr Boncardo made oral submissions on behalf of Mr Franco during the Hearing. Mr Boncardo referred to the extensive documentary submissions that had been filed on behalf of both Parties. The documentary submissions provided on behalf of Mr Franco were respectively dated 3 August, 22 September, and 8 December 2020. In addition, on 8 March 2021, Mr Franco's representatives provided concluding submissions that were confined to issues arising in respect of decisions made within the United Kingdom jurisdiction.

[36] The primary oral submissions were made by both Parties during the proceedings held on 22 February 2021. Mr Boncardo indicated that he wanted to emphasise matters that related to aspects of the three issues that had been identified as requiring determination. Firstly, the submissions made by Mr Boncardo addressed the jurisdictional objection raised by Deliveroo, whereby it was asserted that Mr Franco was not an employee but an independent contractor. Secondly, Mr Boncardo elaborated upon written submissions concerning whether the dismissal of Mr Franco was harsh, unjust, or unreasonable. Finally, Mr Boncardo made submissions in respect to the question of remedy for Mr Franco's asserted unfair dismissal.

[37] Mr Boncardo made submissions in respect to the first matter requiring determination, namely whether Mr Franco was an employee or an independent contractor. In this regard, Mr Boncardo made reference to what he described as four points of principle which he said were part of the multifactorial examination of the nature of the relationship between the Parties. The four matters of particular note were set out in the written submissions of the applicant dated 8 December 2020.

[38] The first matter was said to involve a requirement for consideration of all relevant circumstances with no particular factor necessarily being determinative. In this regard it was submitted that the totality of the relationship, and in particular, its practical economic reality, should be assessed. Further, it was stressed that it would be incorrect to elevate any particular factor of the relationship over others.

[39] Secondly, it was submitted that the issue of whether an individual was running their own business was not an answer to the ultimate question, but it did represent a useful way of approaching the broader inquiry. Consequently, it was submitted that it was relevant to consider whether Mr Franco was running his own business or working in Deliveroo's business.

[40] Thirdly, it was asserted that it was generally unhelpful to apply some analysis or comparison to the circumstances of other cases where either an employment or independent contracting relationship had been found. This submission stressed that it was necessary to consider the particular circumstances of the present matter and avoid any tendency to focus on outcomes of other matters where different facts and circumstances were examined.

[41] The fourth notable point of principle that was advanced on behalf of Mr Franco stressed that the absence of an obligation on an individual to accept work at particular times was not inconsistent with the existence of an employment relationship. In this regard, it was submitted that the primary method of organisation utilised by food delivery companies such as Deliveroo, involved the application of technology which resulted in new and unusual aspects of engagement that were akin to that of a casual employee.

[42] Mr Boncardo submitted that Mr Franco was not carrying on his own business as had been asserted by the submissions made on behalf of Deliveroo. Mr Boncardo submitted that upon a practical analysis, Mr Franco was not engaged in his own business. In support of this proposition, Mr Boncardo referred to extracts from one of the numerous authorities that the Parties had referred to, namely, the case of *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)*[1] (On Call Interpreters).

[43] The submissions made by Mr Boncardo asserted that Mr Franco's circumstances contained none of the indicia necessary to establish that he was conducting his own business. Mr Boncardo said that Mr Franco was not pursuing profits, but only obtaining remuneration for work performed. Further, according to the submissions made by Mr Boncardo, Mr Franco did not promote his business to the public generally or as any separate entity from Deliveroo. Further, Mr Boncardo asserted that there was no capacity for Mr Franco to generate goodwill and to operate a business in any entrepreneurial fashion. Therefore, according to the submissions made by Mr Boncardo, the assertion made by Deliveroo that Mr Franco was conducting his own business, was a proposition that had an air of unreality.

[44] Mr Boncardo further submitted that there were a number of other factors which established that Mr Franco was working within and for Deliveroo's food delivery business. Mr Boncardo stated that the remuneration Mr Franco received was not negotiated and was not able to be negotiated. Further, Mr Boncardo submitted that Mr Franco clearly presented as an emanation of Deliveroo, as he wore clothing and carried an insulation bag which were emblazoned with the Deliveroo name and logo.

[45] Mr Boncardo acknowledged that it was not compulsory for Deliveroo riders to wear and display the Deliveroo branded paraphernalia. However, Mr Boncardo stated that it was Deliveroo's hope and expectation that its riders would wear its branded rain jacket and use its branded food delivery bag, and Mr Franco acted in accordance with Deliveroo's wishes. Mr Boncardo submitted that the presentation of Mr Franco as an emanation of Deliveroo was an important feature distinguishable from the circumstances in the case of *Gupta v Portier Pacific* [2] (Gupta). Mr Boncardo stated that; "*Mr Franco was the human embodiment of Deliveroo to both restaurants and customers*."

[46] Mr Boncardo also referred to the High Court Judgement in the case of *Hollis v Vabu* [3] (Vabu) which he said supported his submission that a fundamental aspect of any determination of whether the relationship between the Parties was that of employment or contractor, involved a consideration as to whether the individual served the others business, or performed their work as part of an independent trade or business of their own. According to the submissions made by Mr Boncardo, the presentation of Mr Franco in Deliveroo paraphernalia supported the finding that he was serving the Deliveroo business rather than conducting his own business.

[47] Mr Boncardo made further submissions in respect to the capacity for Mr Franco to delegate the services that he performed for Deliveroo. Mr Boncardo submitted that although the 2019 supplier agreement and earlier supplier agreement documents, provided Mr Franco with the right to delegate the work that he performed, at no time did he actually delegate his work to another person. Mr Boncardo submitted that the right to delegate was little more than a theoretical proposition, because of the practical impediments associated with the rates of pay and other arrangements that Mr Franco would have to provide to any individual to which he delegated work. Mr Boncardo submitted that because of these practical difficulties there was little likelihood of delegation actually occurring.

[48] The factor or indicium involving the issue of control was the subject of further submissions made by Mr Boncardo. Mr Boncardo submitted that the termination provisions of the supplier agreement document, which permitted termination for any reason, represented a manifestation of control. In addition, Mr Boncardo asserted that Deliveroo's capacity to monitor riders, analyse their performance, and then take action including the termination of their contracts, represented a capacity in practical terms, for Deliveroo to exercise a level of control that was reflective of the existence of an employment relationship.

[49] Mr Boncardo made further submissions in respect of the issue of the lack of exclusivity, whereby riders were permitted to work for competitors of Deliveroo. Mr Boncardo submitted that the fact that Mr Franco could work and did work, for Deliveroo's competitors, was not necessarily contraindicative of the relationship being one of employment. Mr Boncardo submitted that the potential for an individual to work simultaneously for competing delivery companies was a product of the technology, and represented one of the aspects upon which new, novel, and unique labour arrangements had been developed.

[50] In further submissions, Mr Boncardo addressed the issue of the consideration that should be made of the expressed terms contained in the supply/supplier agreement documents. Mr Boncardo submitted that the Parties' characterisation of their relationship as found in the terminology of the contract documents, was not determinative of the question of whether the relationship was one of employment or independent contractor. Mr Boncardo described the supply/supplier agreement documents as contracts of adhesion which were determined by the dominant contracting party, Deliveroo, in circumstances where the weaker party, Mr Franco in this instance, had no capacity in any real sense, to negotiate any of the terms of the contracts.

[51] Mr Boncardo also made submissions regarding the capital outlay associated with the provision of equipment for the performance of the delivery services. Mr Boncardo submitted that Mr Franco had purchased two motorcycles at a total cost of about $5,000. According to the submissions made by Mr Boncardo, Mr Franco had not made a significant capital outlay,

and this represented another distinguishing feature from the circumstances that were analysed in the Gupta case. Further, Mr Boncardo submitted that the nature of the work performed by Mr Franco was relatively low skilled.

[52] Mr Boncardo summarised his submissions in respect to the threshold jurisdictional question by asserting that when all of the relevant factors were examined, when looked at practically, and considered in totality, the relationship between Mr Franco and Deliveroo was one of employment. Mr Boncardo stated that when the evidence of the circumstances surrounding the engagement of Mr Franco was considered in totality and having regard for the practical reality of the relationship, there was no basis to determine that Mr Franco was conducting a business on his own accord, but instead, he was performing work for Deliveroo and he was working in Deliveroo's business. Mr Boncardo submitted that the threshold jurisdictional question should be answered favourably to Mr Franco.

[53] Mr Boncardo made further submissions which dealt with the merit issues surrounding the claim for relief from unfair dismissal. In these submissions, Mr Boncardo referred to the factors contained in s. 387 of the Act.

[54] Mr Boncardo submitted that there was not a valid reason for the dismissal of Mr Franco. Mr Boncardo submitted that the reason for the termination of Mr Franco, namely, failure to deliver orders in a reasonable time, could not represent a valid reason because average delivery times or expected delivery times, had never been notified to Mr Franco or any other riders.

[55] Mr Boncardo also made submissions which asserted that the termination of Mr Franco involved a manifest failure to afford procedural fairness of any kind. Mr Boncardo submitted that Mr Franco had not been told that he was at risk of termination, and that when he sought leniency from Ms Pratt, she had already made up her mind. Mr Boncardo submitted that there was no prospect for any reconsideration of the decision to terminate the services of Mr Franco. Further, Mr Boncardo submitted that any issues concerning Mr Franco's performance had not been drawn to his attention with any degree of specificity, and he was not informed about what he needed to do to remedy any performance concerns. Mr Boncardo also submitted that the sanction of dismissal was disproportionate to any conduct of Mr Franco not being sufficiently fast enough with his deliveries for a short period of time.

[56] In relation to remedy, Mr Boncardo submitted that reinstatement, which was the primary remedy, should be provided, and that any assertion that there had been a breakdown of trust and confidence should be rejected. Mr Boncardo submitted that Mr Franco's involvement in a campaign by the TWU and other delivery riders, seeking improvements in working conditions in the gig economy, should not provide basis to prevent the reinstatement which was sought by Mr Franco.

[57] In conclusion, Mr Boncardo submitted that the jurisdictional objection raised by Deliveroo should be rejected, as Mr Franco was an employee of Deliveroo. Further, it was submitted that the termination of Mr Franco's services by Deliveroo represented an unfair dismissal for which the remedy of reinstatement, continuity and backpay should be provided.

The Case for Deliveroo

[58] Mr Felman made submissions on behalf of Deliveroo during the Hearing. The submissions made by Mr Felman referred to and relied upon documentary submissions filed on behalf of Deliveroo and respectively dated 1 September and 16 December 2020. In addition, on 2 March 2021, the respondent provided additional submissions that were confined to issues arising in respect of decisions made within the United Kingdom jurisdiction.

[59] The oral submissions made by Mr Felman during the Hearing on 22 February 2021, highlighted what he described to be some of the more critical features of the case, and he referred to and relied upon the extensive written submissions that had been made on behalf of Deliveroo.

[60] In abbreviated summary, the written submissions made on behalf of Deliveroo asserted that, having regard to the totality of the relationship, Mr Franco was not an employee of Deliveroo, but rather an independent contractor. It was submitted that Mr Franco was an independent contractor because of factors such as; he was not required to perform services for Deliveroo personally; he was permitted to work largely whenever and wherever he chose, and for whatever length of time he wished; he was able to reject or accept work offered to him without consequence; he was able to perform work for multiple entities at the same time; he entered into a contract expressly providing that he was a supplier in business on his own account; he was paid on invoice for each delivery performed; he provided at his own expense, the two principal tools required to perform his duties; when he completed deliveries he determined what route to take; and he was required to indemnify Deliveroo for any loss incurred as a result of his or his delegate's negligence.

[61] Consequently, the primary submissions made on behalf of Deliveroo strongly asserted that Mr Franco was not an employee and therefore not protected from unfair dismissal. In the alternative, it was further submitted that the dismissal of Mr Franco was not harsh, unjust, or unreasonable. Finally, the submissions made on behalf of Deliveroo contended that, if contrary to Deliveroo's primary submissions, it was found that Mr Franco was an employee and that he had been unfairly dismissed, there had been an irretrievable loss of trust and confidence in Mr Franco, and therefore any remedy of reinstatement would be inappropriate.

[62] The submissions made by Mr Felman included a detailed analysis of the delivery process and stressed that the Frank algorithm used by Deliveroo allocated offers of work irrespective of whether the rider had booked a session in advance and without regard to the acceptance rate or how fast the rider had delivered orders in the past. Mr Felman said that the Frank algorithm was essentially totally blind to the personal characteristics of the rider, and this was an important distinguishing feature from some other cases.

[63] Mr Felman made submissions which noted that riders could choose to accept or reject order offers and that even after picking up an order the rider could unassign themselves from the delivery. Further, Mr Felman stressed that Deliveroo had no control over the times at which a particular rider would log into the system or the zones that they would choose to operate in. These arrangements were, according to the submissions made by Mr Felman, not reflective of employment where a traditional employer could marshal its labour force to meet certain demands.

[64] Mr Felman stated that even during the period of operation of the SSB system which did involve preferential arrangements for engagement of riders based on metrics involving attendance rate, late cancellation rates and preparedness to participate at super peak times, Deliveroo did not take into account the number of orders accepted or actually delivered, or the hours that a particular rider was logged into the Deliveroo Rider App. Mr Felman submitted that when the detailed aspects of the delivery system were properly considered, it illustrated that Deliveroo did not exercise a level of control over Mr Franco which would be necessary in order to establish an employment relationship. As an example, Mr Felman submitted that it would be very unusual employment whereby you could attend or not attend at your own discretion, not advise anyone when you would or would not be available, and not suffer any consequences at all.

[65] The submissions made by Mr Felman referred to the test to be used by the Commission in assessing whether Mr Franco was an employee. In this regard it was submitted that the approach was broadly uncontroversial, and it involved examination of the identified factors or indicia whereby no one particular factor was necessarily elevated over another, and the determination required contemplation of all of the factors in totality. Mr Felman referred to the various authorities that had considered the multifactorial test and in particular, he stressed that it had been established that it was not correct to focus upon whether someone runs their own business as the focal point for any determination. Mr Felman submitted that whether Mr Franco was running his own business was simply one of the factors that needed to be assessed as part of the whole picture required with any determination of whether the relationship was one of employment or independent contractor.

[66] Mr Felman's submissions referred to the High Court judgement in the case of *Automatic Fire Sprinklers Pty Ltd v Watson* [4] (Automatic Fire Sprinklers) which it was said established that employment in the Australian jurisdiction involved an obligation on one side to personally perform the work that might reasonably be demanded under the contract, and on the other side to pay for such work or services. This was described as the "*irreducible minimum of mutual obligation*", and represented a work-wages bargain that required the services to be personally performed. Mr Felman submitted that it was clear that in this case there was no obligation on Mr Franco to actually perform services for Deliveroo, but rather the obligation was for Mr Franco to arrange for the provision of the services.

[67] Mr Felman stressed that although Mr Franco did not actually delegate any of the services that he performed for Deliveroo, it was the capacity or right for that delegation, that was relevant and an important factor that married with the contractual obligation of Mr Franco to arrange for the provision of the delivery services and not necessarily perform those services himself. According to the submissions made by Mr Felman, there was little qualification attached to any delegation of the services provided by Mr Franco, and the right to delegate was at odds with the irreducible minimum of mutual obligation that had been established in the Automatic Fire Sprinklers judgement.

[68] In respect to the issue of the right of delegation or sub-contracting, the submissions made on behalf of Deliveroo also relied upon the judgement in *ACE Insurance Ltd v Trifunovski and Others* [5] (ACE Insurance). It was further submitted that the ACE Insurance judgement confirmed the proposition that the contract of employment required that personal services be discharged by the employee, and that the ability to delegate or discharge the performance of services to another was inconsistent with the existence of a contract of

employment. Consequently, Deliveroo submitted that the ability for Mr Franco to delegate the services that he performed, was a factor that strongly supported that the relationship between Mr Franco and Deliveroo was that of independent contractor and principal, and not that of employee and employer.

[69] The issue of the capacity and exercise of a level of control was the subject of further submissions made by Mr Felman. Mr Felman submitted that the Parties acknowledged that control was an important factor but as with all other factors, it was not singularly determinative. Mr Felman submitted that control, in respect to a requirement to comply with any reasonable directive, was a fundamental tenant of an employment relationship in Australia, and it was something that was almost completely absent in the relationship between Mr Franco and Deliveroo.

[70] According to the submissions made by Mr Felman, Deliveroo had no control over Mr Franco's obligation to work or for the hours which he worked. Mr Felman submitted that Mr Franco determined when, and where, and for how long he would work, and that during the operation of the SSB system, Mr Franco was not required to work at a particular time or in a particular zone, and he maintained a capacity to work when he felt like it.

[71] Mr Felman also made submissions which rejected the proposition that the termination provisions in the 2019 supply agreement document was a manifestation of control. Mr Felman submitted that it was commonplace for contracts to provide capacity for the principal to terminate the contractor's engagement in circumstances where the contractor breached a term of the contract. Mr Felman submitted that just because there was some control to end a contract for non-performance, such capacity did not create an employment relationship.

[72] It was also submitted by Mr Felman that Deliveroo did not possess any right to discipline Mr Franco. Mr Felman submitted that the fact that Deliveroo could monitor individual orders and other aspects of rider performance, did not involve control of riders as this monitoring was not for the purposes of controlling riders, but instead to ensure that customers received their delivery orders in a timely fashion.

[73] Mr Felman further submitted that Mr Franco was able to work for competitors of Deliveroo, namely Uber Eats and Door Dash, and on three occasions he was logged into all three delivery company platforms at the same time. Mr Felman submitted that this "multi-apping" represented a different circumstance to that which may involve a casual employee who performed work for two or more employers who were competitors. Mr Felman submitted that the ability for Mr Franco to work for Deliveroo's competitors, which even extended to simultaneously performing work for competitor companies, was a further reflection of a lack of control that would ordinarily exist in an employment relationship.

[74] The next important feature of control that Mr Felman referred to involved Mr Franco's ability to reject or unassign a delivery order. Mr Felman submitted that Mr Franco had no obligation to comply with any lawful direction given by Deliveroo, and he could simply decide that after having accepted an order he did not wish to complete the delivery. Importantly, Mr Felman submitted that even if it was clear that in unassigning a particular order Mr Franco was not acting in Deliveroo's best interests, he was not disciplined or cautioned or reprimanded. Mr Felman said that this reflected that Mr Franco was acting in his own best interests because he was a commercial partner of Deliveroo, rather than an employee who was obliged to perform work in the interests of the employer.

[75] Mr Felman also submitted that Deliveroo did not have control over the type of vehicle that Mr Franco used, or the routes which he adopted when performing the delivery services. Mr Felman said that even if Deliveroo had a view that a particular zone was more conducive to a particular type of transport, it was bad luck for Deliveroo because the rider could use whatever form of transport they wanted.

[76] Mr Felman summarised the various aspects which he asserted demonstrated that Deliveroo did not have a level of control over Mr Franco which would be consistent with the control ordinarily found in an employment relationship. Mr Felman submitted that the lack of Deliveroo's ability to control when and where Mr Franco worked, for how long he worked, whether he could work for competitors, whether he could reject work, and what vehicle and route he took, when considered in totality, were not attendant to an employment relationship.

[77] Mr Felman made further submissions in respect to the contractual terms contained in the 2019 supplier agreement. Mr Felman referred to the Full Federal Court judgement in the case of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [6] (Personnel Contracting), which he said established that although contractual terms were by no means decisive, they nevertheless represented a relevant factor for consideration of the question of the nature of the relationship. According to the submissions made by Mr Felman, particularly in circumstances where the multifactorial approach was finally balanced, the terms of any contractual documentation was a factor of relevance to be weighed into the consideration mix.

[78] Mr Felman also made submissions about the issue regarding the provision of equipment. In this regard, Mr Felman submitted that the provision of two motorcycles and a mobile phone was a substantial outlay and represented quite a significant investment on the part of Mr Franco. Mr Felman noted that Mr Franco was responsible for maintaining his own tools of trade namely, his motorcycles and his phone, and he claimed tax deductions in respect of costs associated with these items. Further, Mr Felman submitted that it was also relevant to note that Mr Franco was responsible for his own tax, and he was required to obtain and maintain an Australian Business Number.

[79] The further submissions made by Mr Felman rejected the assertions whereby Mr Boncardo submitted that Mr Franco was not conducting a business of his own and not able to generate any goodwill. Mr Felman said that although Mr Franco may have not been conducting a sophisticated business operation with advertising, website, and associated paraphernalia, he was clearly presenting himself as a "rider for hire". In addition, Mr Felman stated that although Mr Franco was a relatively low skilled worker, this was not a bar to him being a contractor, and there were many cases where courts and tribunals had concluded that workers were independent contractors, notwithstanding that they performed relatively low skilled work. In this regard, Mr Felman noted that in the Gupta case the work was that of Uber delivery driver, and in the Personnel Contracting case it was work of a building labourer.

[80] Mr Felman also made submissions regarding the provision of a uniform to Mr Franco. Mr Felman contended that although Mr Franco was provided with some Deliveroo apparel which he did wear, he was not required to wear it, and therefore this factor should represent a neutral consideration.

[81] Further submissions were made by Mr Felman which examined in some detail the consideration of the majority of the Full Bench in the Gupta case. In particular, Mr Felman submitted that two of the three determinative factors that were identified by the Full Bench majority in the Gupta case were clearly found in this instance. Mr Felman stressed that the lack of control that Uber had in respect of how long and when Ms Gupta performed work, and that once logged in there was no obligation to accept any particular delivery request, were the same circumstances that applied to Mr Franco. In addition, Mr Felman said that the capacity to work for another competitor was another factor that was consistent between the circumstances in the Gupta case and in this matter.

[82] Mr Felman made further submissions which referred to eight key differences that had been identified with the circumstances that were present in the case of *Klooger v Foodora Australia Pty Ltd* [7] (Klooger). Mr Felman noted that Mr Klooger was paid by the hour at one point in time, and importantly, he did not have access to the free log in arrangements which were utilised by Mr Franco. Further, Mr Felman said that Mr Klooger had titles and roles which integrated him into the organisation, and he was subject to the batching system which analysed various performance factors relevant to the priority for engagement which provided for a significantly higher capacity to control than in the circumstances applicable to Mr Franco. Mr Felman also identified that in the Klooger case, it was considerably more difficult to be able to simultaneously work for two or more food delivery companies. Further, Mr Klooger supplied just a bicycle whereas Mr Franco had two motorcycles, and Mr Franco spent a significantly different proportion of remuneration on business expenses. Consequently, according to the submissions made by Mr Felman, the circumstances in this instance were much closer to the factual circumstances that were established in the Gupta case.

[83] Mr Felman summarised his submissions in respect to the primary issue regarding whether Mr Franco was an employee or contractor. Mr Felman said that the evidence had established a picture which revealed a number of significant factors relevant to Mr Franco's engagement with Deliveroo. Mr Felman submitted that the picture that emerged was that Mr Franco was not required to perform services personally, he could work whenever and wherever he chose, and for whatever length of time he wished. Further, Mr Franco could reject or accept work that was offered to him, and he executed a contract that stated that he was a supplier of business in his own account. In addition, Mr Franco was paid on invoice for each delivery, he indemnified Deliveroo for any losses, he was not provided with any leave or other employment entitlements, he deducted expenses on his tax returns for significant capital expenditure in the form of two motorcycles, and he was not subjected to a level of control by Deliveroo as would be the case in an employment relationship. Therefore, Mr Felman submitted that by way of application of the multifactorial test, and having regard for all of the relevant factors, the Commission should determine that Mr Franco was not an employee of Deliveroo. Mr Felman submitted that the proper characterisation of the relationship between Mr Franco and Deliveroo was that of independent contractor and principal.

[84] Further submissions were provided on behalf of Deliveroo in the event that the Commission found that the applicant was an employee who was protected from unfair dismissal. These submissions contended that the dismissal of the applicant was not harsh, unjust, or unreasonable. The submissions made on behalf of Deliveroo addressed the various factors contained in s. 387 of the Act, which, it was said, supported the proposition that any dismissal of the applicant was not harsh, unjust, or unreasonable.

[85] In respect to paragraph (a) of s. 387 of the Act, it was submitted that Deliveroo had a valid reason to terminate Mr Franco's services. Deliveroo asserted that valid reason for dismissal of Mr Franco arose from his poor delivery service which involved his consistently delayed delivery times. Deliveroo submitted that Mr Franco was obligated under the 2019 supplier agreement, to complete his delivery services within a reasonable time, and to provide services with due care, skill and ability. It was submitted that Mr Franco had breached this obligation, and the breach of this obligation established valid reason for his dismissal.

[86] In respect to paragraphs (b), (c) and (e) of s. 387 of the Act, Deliveroo accepted that the decision to terminate Mr Franco's 2019 supplier agreement was made without providing him with an opportunity to respond to the reason prior to the decision being taken. Deliveroo acknowledged that it did not treat Mr Franco as an employee when it made its decision to terminate the 2019 supplier agreement, and it accepted that considerations in s. 387 (b), (c) and (e) of the Act had not been satisfied. Further, Deliveroo submitted that paragraph (d) of s. 387 was not relevant to the proceedings, and in respect to paragraphs (f) and (g), it acknowledged that it was a large organisation which had access to internal expertise.

[87] Mr Felman made concluding submissions in respect to the issue of any potential remedy for unfair dismissal. In these submissions, it was asserted that as Mr Franco had participated in and featured prominently in a public campaign that had been conducted by the TWU which attacked Deliveroo's alleged treatment of its riders, there had been an irretrievable breakdown in the relationship between Mr Franco and Deliveroo. Therefore, Mr Felman submitted that any remedy involving reinstatement of Mr Franco would be inappropriate. The submissions made on behalf of Deliveroo also asserted that in the event that the Commission determined that the applicant had been unfairly dismissed, there was insufficient evidence to support a proper basis to establish the extent of any financial loss.

Consideration

Employee or Contractor

[88] Section 382 of the Act establishes when a person is protected from unfair dismissal and relevantly includes the following terms:

> "**382 When a person is protected from unfair dismissal**
>
> A person is ***protected from unfair dismissal*** at a time if, at that time:
>
> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and…." [emphasis added]

[89] The respondent in these proceedings, Deliveroo, has raised a jurisdictional objection which has asserted that the applicant, Mr Franco, was not a person protected from unfair dismissal because he was not an employee of Deliveroo but, instead, an independent contractor providing services to Deliveroo. Consequently, the first and most significant contest for determination has been whether Mr Franco was an employee of Deliveroo and therefore protected from unfair dismissal.

The Legislative Regime

[90] Section 11 of the Act is titled, "*Meanings of employee and employer*" and is in the following terms:

> **"11 Meanings of *employee* and *employer***
>
> In this Part, ***employee*** and ***employer*** have their ordinary meanings.
>
> Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances)."

[91] Section 12 of the Act is titled, "*The Dictionary*" and it includes the following references to the words, employee, and employer:

> "***employee*** is defined in the first Division of each Part (other than Part 1-1) in which the term appears.
>
> Note 1: The definition in the Part will define ***employee*** either as a national system employee or as having its ordinary meaning. However, there may be particular provisions in the Part where a different meaning for the term is specified.
>
> Note 2: If the term has its ordinary meaning, see further subsections 15(1), 30E(1) and 30P(1).
>
> Note 3: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).
>
> ***employer*** is defined in the first Division of each Part (other than Part 1-1) in which the term appears.
>
> Note 1: The definition in the Part will define ***employer*** either as a national system employer or as having its ordinary meaning. However, there may be particular provisions in the Part where a different meaning for the term is specified.
>
> Note 2: If the term has its ordinary meaning, see further subsections 15(2), 30E(2) and 30P(2).
>
> Note 3: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances)."

[92] Part 3-2 of the Act is titled "*Unfair Dismissal*" and Division 1 of Part 3-2 includes s. 380 which is titled "*Meanings of employee and employer*" and is in the following terms:

> **"380 Meanings of *employee* and *employer***
>
> In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.
>
> Note: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances)."

[93] Division 3 of Part 1-2 of the Act is titled "*Definitions relating to the meanings of employee, employer etc.*" and relevantly includes sections respectively titled, "*13 Meaning of national system employee, 14 Meaning of national system employer, and 15 Ordinary meanings of employee and employer*". Relevantly, s. 13 is in the following terms:

> "**13 Meaning of *national system employee***
>
> A ***national system employee*** is an individual so far as he or she is employed, or usually employed, as described in the definition of ***national system employer*** in section 14, by a national system employer, except on a vocational placement.
>
> Note: Sections 30C and 30M extend the meaning of ***national system employee*** in relation to a referring State."

[94] There was no dispute that Deliveroo was a national system employer to the extent that it would satisfy the meaning provided by subsection 14 (1) (a) of the Act which is in the following terms:

> **"14 Meaning of *national system employer***
>
> (1) ***A national system employer*** is:
>
> (a) a constitutional corporation, so far as it employs, or usually employs, an individual; or…"

[95] To complete the legislative picture, s. 15 of the Act is titled "*Ordinary meanings of employee and employer*" and is in the following terms:

> **"15 Ordinary meanings of *employee* and *employer***
>
> (1) A reference in this Act to an employee with its ordinary meaning:
> (a) includes a reference to a person who is usually such an employee; and
> (b) does not include a person on a vocational placement.
>
> Note: Subsections 30E(1) and 30P(1) extend the meaning of ***employee*** in relation to a referring State.

(2) A reference in this Act to an employer with its ordinary meaning includes a reference to a person who is usually such an employer.

Note: Subsections 30E(2) and 30P(2) extend the meaning of ***employer*** in relation to a referring State."

[96] Consequently, the Act provides unfair dismissal protection for a *national system employee*, and it does not in any way qualify, alter, or specify that the term "employee" in the context of a *national system employee*, should be given other than its ordinary meaning. The ordinary meaning of employee is that established by the common law in Australia. In this case, the jurisdictional objection was advanced by Deliveroo on the basis that the applicant did not satisfy the meaning of a *national system employee* because he was not an employee of Deliveroo in satisfaction of the ordinary, common law meaning of an employee.

The Common Law Position

[97] The common law question of whether a person is an employee, or an independent contractor is an issue that has involved an extensive amount of litigation over many years. Much of the litigation historically emanated from issues surrounding vicarious liability, and the common law outcomes are, by necessity, binary, that is there are only two alternatives, employee, or independent contractor. The history of the common law on this question has been most articulately summarised by His Honour Lee J in the Personnel Contracting case where, at 61, it is stated: "*It is fair to say that the evolution of this dichotomy has produced ambiguity, inconsistency and contradiction. As Freeland has stated, the "accumulation of case law has added weight rather than wisdom" to how this dichotomy works in a practical sense: Freeland M, The Personal Employment Contract (Oxford University Press, 2003) (at 20).*"

[98] The dichotomy of the common law position in Australia has been manifestly displayed by two Federal Court of Australia Full Court judgements delivered on consecutive days, 16 and 17 July 2020. The first judgement[8] found that owner drivers of delivery trucks were employees, and the second judgement (Personnel Contracting) found that a labourer engaged by a labour hire company was an independent contractor. Similarly, decisions of the Commission have found that a food delivery worker riding a bicycle was an employee, and a food delivery worker driving a motor vehicle was an independent contractor. These are examples of the vagaries of the application of the common law upon the question of the ordinary meaning of an employee.

[99] Despite the potential for an outcome that may perpetuate ambiguity, inconsistency and contradiction, Deliveroo's jurisdictional objection to Mr Franco's unfair dismissal claim has required application of the common law principles that direct any determination as to whether Mr Franco was an employee of Deliveroo or an independent contractor. The correct approach to a determination of whether a person has been engaged as an employee or an independent contractor involves issues of both fact and law. The particular factual circumstances of the relationship under examination need to be subjected to the common law principles that have been established as relevant to the proper characterisation that is to be provided to that relationship.

The Multifactorial Test, the Overall Picture and the Binary Outcome

[100] In this instance, the barristers who appeared for the respective Parties broadly agreed with the identified distillation of the relevant legal principles that have developed from a considerable body of case law and particular reference was made to inter alia; the High Court judgements in; *Automatic Fire Sprinklers Pty Ltd v Watson* [9] (Automatic Fire Sprinklers); *Stevens v Brodribb Sawmilling Co Pty Ltd* [10] (Brodribb), and *Hollis v Vabu* [11] (Vabu); and, Full Federal Court judgements including; *ACE Insurance Ltd v Trifunovski and Others* [12] (ACE Insurance); *Dental Corporation Pty Ltd v Moffet* [13] (Dental Corporation); *Jamsek v ZG Operations Australia Pty Ltd* [14] (Jamsek); *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [15] (Personnel Contracting) and, Federal Court judgements including; *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)*[16] (On Call Interpreters); *Howard v Merdaval Pty Ltd* [17] (Merdaval); and in respect to Decisions of the Commission; *Abdalla v Viewdaze* [18] (Abdalla); *Cai (t/a French Accent) v Do Rozario* [19] (French Accent); *Kaseris v Rasier Pacific V.O.F.*[20] (Kaseris) and, in particular, the Full Bench decision in *Gupta v Portier Pacific* [21] (Gupta).

[101] In broad terms, the relevant legal principles have been described as the adoption of a multifactorial approach which involves the consideration of various factors including a number of identified indicia, with no single factor being decisive, and an overriding requirement for examination of the totality of the relationship between the Parties so as to ultimately provide a sound basis upon which to determine whether the relationship was one of employment or independent contractor. The multifactorial approach involves what has been described as "*the relevance of intuitive appreciation and assessment of the whole, rather than a process of mechanically disaggregating and deconstructing different parts of the relationship by tests drawn from other cases*."[22]

[102] Further, the multilateral approach has been identified to not involve any "*universally accepted understanding of how many indicia, or what combination of indicia must point towards a contract of service, the balancing exercise is necessarily impressionistic*:"[23] Further, it has been described as "*a "smell test", or a "level of intuition*".[24] In addition, the appreciation of the totality of the picture that is presented includes an element of practical reality, and it must also avoid the formation of a view derived from any notion that it would be appropriate or desirable for the person to be classified as an employee, as opposed to a determination that the individual is an employee. As was also stated in the Personnel Contracting case:

> *"In particular, it is not a task of weighing up the relevant indicia to form a view as to whether a person should be classified as an employee, but making a determination as to whether a person is an employee."*[25]

[103] The multifactorial approach was usefully summarised by the Full Bench of Fair Work Australia in the French Accent decision and this was more recently endorsed by the Full Bench Commission decision in Gupta[26]. At paragraph [30] of the French Accent decision the following extract from subparagraph (5) provides a particularly insightful summary of the task that must be performed in order to properly determine the question of whether the relationship under examination is one of employment or independent contractor:

> *"The object of the exercise is to paint a picture of the relationship from the accumulation of detail. The overall effect can only be appreciated by standing back*

from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole."[27]

[104] Consequently, consideration has involved examination of the more significant indicia relevant to the particular circumstances of this case so as to enable the emergence of the overall picture from which the informed, considered, and qualitative appreciation can provide the binary outcome.

Control

[105] The indicium of control is an important factor. It is clear that control involves more than just the actual exercise of control but also the capacity to be able to exercise control. In particular, it is necessary to examine whether the putative employer has the ability to exercise control over the worker even if it chooses not to actually utilize the level of control that it has at its disposal.

[106] Deliveroo asserted that it had no control over when or where Mr Franco worked or for how long he worked during any particular engagement. This purported absence of control was asserted to be consistent with one of the three critical factors which pointed decisively away from a finding of employment as identified at paragraph [69] in the Gupta decision.

[107] Mr Franco could log on to the Deliveroo Rider App whenever he felt like working, and he was not required to continue working for any particular period of time, and in broad terms, he could choose the location in which he would undertake deliveries. Further, Mr Franco could choose not to complete particular work and unassign from a delivery order without any apparent consequences. These arrangements had the appearance of an absence of the level of control that would usually be a necessary component of an employment relationship. However, a more detailed examination beyond the mere appearance of the apparent freedoms that were provided to Mr Franco, reveals a very different picture.

[108] For most of the time that Mr Franco performed work for Deliveroo (between February 2018 and January 2020) his engagements to work were made under the SSB rider engagement system. The SSB system required riders to book engagement sessions in advance, and preferential treatment for booking desirable times for engagement was provided to riders who met performance measurements or metrics that Deliveroo determined. The SSB system used the performance metrics of the attendance rate of the rider, the number of late cancellations that a rider had made with less than 24-hour's notice, and the rider's preparedness to participate at times of peak demand.

[109] Consequently, although it appeared that Mr Franco had the freedom to choose when and where to work, the practical reality was that the SSB system directed him to undertake work at particular times, and to regularly make himself available for work, and to not cancel booked engagements. Although Deliveroo did not require a rider to work for any particular length of time, or to even accept a delivery order once they had logged into a booked session, the economic reality of the situation would ordinarily compel a rider to undertake delivery work. After all, the objective of the entire process is to get paid.

[110] Deliveroo ceased operation of the SSB system in January 2020, and it then allowed free access to the Deliveroo Rider App. However, what is important is the capacity that Deliveroo possesses to exercise a significant level of control. Deliveroo may perhaps decide

to reintroduce the SSB system or some other system of rider engagement, which may involve utilisation of any combination of the vast array of rider performance metrics that it has at its disposal.

[111] Work that is undertaken via computerised platform based engagements provides the operators of those digital platforms, such as companies like Deliveroo, with an extraordinarily vast repository of data relating to the performance and activities of those individuals who perform the work. It takes little imagination to envisage that the data or metrics in the possession of a company such as Deliveroo, can be used as a means to control those who perform the work. As was the case in this instance, the control can be switched on and off as business needs and circumstances might have Deliveroo determine.

[112] Consequently, what might have, superficially, appeared to be an absence of control over when, where, or how long Mr Franco performed work for Deliveroo, actually camouflaged the significant capacity for control that Deliveroo, (like other digital platform companies) possesses. The capacity for this control is inherently available from any utilisation of the significant volume of data that provides the metrics upon which control of engagement and performance of the work may be exercised. True it was that Mr Franco was not under any obligation to actually perform work for Deliveroo, but Deliveroo could exercise significant control over when, where and for how long Mr Franco worked if it chose to do so. Any apparent impediment to the exercise of alternative engagement controls that might seem to arise from the terms of the 2019 supplier agreement, could be overcome by Deliveroo introducing another version of its supplier agreement document.

[113] Deliveroo also asserted that its capacity to terminate the 2019 supplier agreement for poor performance was not a manifestation of control. It may be noted that commercial contracts would usually contain provisions that permit a party to terminate the contract for breach or substandard performance. In the Gupta case, contractual provisions that establish and enforce performance and quality standards was considered to be a neutral factor. However, the Personnel Contracting judgement appeared to take a different view wherein it was stated: "*In substance, the threat of termination on short notice is a manifestation of control.*"[28]

[114] Mr Franco was sent a number of emails from Deliveroo concerning aspects of his work, which recorded complaint about matters such as Order Marked Delivered, Not Received (OMDNR), App misuse, RET Notification and ultimately, Poor Delivery Service Termination. Although Deliveroo did not discipline Mr Franco for any of these issues prior to the termination of his services, it clearly had the capacity to do so but it chose to only exercise that capacity at the point of termination.

Work Performed for Competitors

[115] Deliveroo expressly permitted Mr Franco to work for any of its competitors. Mr Franco provided services to Uber Eats from about April 2018, and he also performed work for Door Dash from March 2020. In response to the proposition that working for multiple competitors could be compared to circumstances where a casual or part-time employee might work for a number of employers, Deliveroo emphasised that Mr Franco was able to, and in fact did, work for multiple competitors at the same time. This has been described as "multi-apping" and Deliveroo asserted that this circumstance was not a feature of casual or part-time

employment which would require that during the period of time worked for each employer, the employee would provide exclusive service to that employer.

[116] In most circumstances a casual or part-time employee could not work for multiple employers at the same time. Certainly, in respect to the examples of traditional employment where an employee might physically work for both McDonald's and Hungry Jacks, it would simply be impossible for an individual to be simultaneously physically present in two different workplaces. However, multi-apping is an example of the phenomenon of change that new technology is bringing to the traditional arrangements for employment.

[117] Traditional arrangements for the performance of work have altered significantly in response to the Covid-19 pandemic, and these changes have been facilitated by the introduction and application of new technologies. Employment that had historically, always involved the physical presence of the employee at a workplace has, in recent times, changed dramatically. Work that was traditionally performed in a workplace is increasingly being performed remotely from home or some other location. Consequently, circumstances where an individual may be simultaneously working for two or more employers has become a reality because the physical presence of that individual in a workplace is no longer a fundamental requirement for the work to be performed. The prospect that an individual might be simultaneously engaged in, for example, multiple online customer service chatrooms, and call centre activities, and online telemarketing, for two or more employers, is in reality, only restricted by either the number of web access points available to that individual, or any prohibition on secondary employment stipulated by a particular employer.

[118] Although the traditional arrangements for the performance of work would not have envisaged simultaneous employment for two or more employers, and in many instances the physical performance of work would continue to prevent simultaneous employment occurring, traditional notions regarding the exclusivity necessary for the establishment of an employment relationship require reconsideration. The expressed permission provided by Deliveroo for riders to work for its competitors and to engage in the multi-apping as Mr Franco did, is a factor which points against the existence of an employment relationship. However, in the context of the modern, rapidly changing workplace, it could not represent a factor that should be construed as preventing the existence of an employment relationship.

The Terms and Terminology of the Supply/Supplier Agreements

[119] The terms and terminology of the supply/supplier agreement documents clearly attempt to establish a relationship of principal and independent contractor. In some respects, the service contract documents go to considerable lengths to stipulate that the supplier is not an employee, and to reinforce that the document is constructing a relationship of principal and independent contractor.

[120] The written terms of the supply/supplier agreements are an important factor in any determination of the correct characterisation of the relationship between the Parties that have executed the documents. However, in this case the documents were described as contracts of adhesion where the dominant party, Deliveroo, determined the terms unilaterally, and therefore any consideration of those terms needed to be cognisant of the circumstances under which the contracts were established.

[121] The supply/supplier agreements contained some provisions which are similar in form and substance to those that would ordinarily be found in an employment contract document. For example, the supplier is required to be professional and provide services with due care, skill and ability, and comply with all applicable work-related health and safety legislation, and Deliveroo's Health & Safety guidelines, and the equipment to be used for food transportation must meet Deliveroo's safety standards. Interestingly, the 2017 supply agreement stated at clause 10.5: "*Deliveroo will obtain and maintain workers compensation insurance in respect of You as required by the law of the State or Territory in which you supply Services to Deliveroo*."

[122] The evidence clearly established that Mr Franco had no capacity to negotiate any of the terms of the supply/supplier agreements. The practical reality of the circumstances was that Deliveroo presented the contractual arrangements to Mr Franco and other riders, as a *fait accompli*. Mr Franco could not even negotiate an additional one-off payment when he was being requested to undertake a particularly undesirable delivery order.

[123] Consequently, although the supply/supplier agreements are an important indicium, the circumstances for Mr Franco mean that these documents need to be treated with the level of caution that can be identified from the following extract from the Personnel Contracting judgement:

> *"As the Supreme Court recognised in Autoclenz v Belcher, the true nature of a work contract, as distinct from commercial contracts, often involves inequality of bargaining power, where the organisation offering the work is in a position to dictate the terms of the paction on a "take-it-or-leave-it" basis. In these circumstances, the traditional bargain theory of contract is hardly apposite. Put directly in terms of the present circumstances, it is difficult to reconcile the central conception of a multi-factorial inquiry with the notion that the legal construct reflected in a contract of adhesion presented to an eager a 22-year-old backpacker, can assume decisive importance as a "default" or as a "tie-break"."*[29]

Provision of Equipment - Capital Outlay and Expertise

[124] Mr Franco provided his own equipment in the form of a motorcycle and smartphone. In reality, Mr Franco would have ordinarily required this equipment for his own personal use. Consequently, Mr Franco did not have a substantial investment in the capital equipment that he used to perform his delivery work.

[125] The motorcycles that Mr Franco used for delivery work were also used generally for transportation of himself and his family. In addition, and without in any way being disparaging to food delivery riders or drivers, there was not a high degree of skill or training required to use or operate a vehicle in the performance of the delivery work.

Personal Service

[126] The personal service nature of employment would normally not permit another individual to perform the work of an employee. The prospect that an employee could delegate or sub-contract her or his work to another would, ordinarily, be antithetical to the existence of any employment relationship.

[127] In this instance, Deliveroo provided expressed permission for Mr Franco to delegate or subcontract to another person to perform his work, subject to certain terms and conditions. The evidence established that Mr Franco did not delegate the performance of his work to any other person. Further, there were clear financial constraints upon any subcontracting that involved an employment relationship between Mr Franco and any delegate because the remuneration that Mr Franco received from Deliveroo would be unlikely to cover payment of the national minimum wage to any delegate.

[128] Notwithstanding the absence of any actual delegation in this instance, the clear capacity for Mr Franco to have someone else perform his work for Deliveroo is a factor that points against the existence of an employment relationship. However, arrangements involving shift or job swaps are circumstances which are frequently encountered in the context of an employment relationship. In many instances, a casual employee may be unable or unwilling to work a predetermined engagement and an employer may direct that individual to find a replacement. Consequently, although the capacity to delegate the work to another is an indicator of an absence of an employment relationship, it does not prevent it.

Presentation as Part of the Business

[129] Deliveroo established an expectation that Mr Franco would dress in Deliveroo branded attire, and utilise equipment displaying the livery of the Deliveroo brand. Mr Franco did wear the Deliveroo clothing and he used the equipment displaying the Deliveroo brand logo. Although Deliveroo did not compel or require Mr Franco to use the Deliveroo branded attire and equipment, he was clearly encouraged to present himself to the world as a part of the Deliveroo business.

Mode of Remuneration

[130] Mr Franco was paid an amount per delivery and Deliveroo generated a templated invoice which was provided on a routine basis. Deliveroo had access to the recorded time and date of each delivery completed by inter alia, Mr Franco via the Deliveroo Rider App, and it utilised this information to produce the invoices upon which Mr Franco was then paid.

Taxation

[131] Deliveroo did not deduct income tax from the remuneration paid to Mr Franco via the routine invoicing system. Further, Mr Franco was responsible for all costs associated with maintaining his motorcycles and he claimed these expenses as business deductions. Although Mr Franco was responsible for the payment of his own tax, and this is a factor pointing in favour of independent contractor status, it was an arrangement that was a logical reflection of the arrangements established under the supply/supplier agreements.

Holiday and Sick Leave

[132] Mr Franco was not provided with any leave entitlements in respect to his work for Deliveroo as a delivery rider.

Distinct Profession or Trade

[133] The work performed by Mr Franco did not involve an established profession, trade or distinct calling. The work of Mr Franco was that of a food delivery rider. However, as in the case of the Personnel Contracting judgement, low skilled work has not prevented findings that the work was performed by a person conducting an independent business and not as an employee.

An Entrepreneurial Business with Potential Goodwill

[134] Deliveroo asserted that Mr Franco was conducting his own business and as an entrepreneur he was developing goodwill by presenting himself as a "rider for hire". Contrary to this submission, there was no evidence that Mr Franco sought to in any way, distinguish himself from his presentation to the world as a Deliveroo food delivery rider. Further, the evidence established that there was no prospect for Mr Franco to have developed any goodwill or tangible value that could be attached to any asset that arose from the work that he was conducting as a food delivery rider.

The United Kingdom Decisions

[135] A few days before the last day of Hearing in this matter, 22 February 2021, the United Kingdom Supreme Court issued a judgement in the case of *Uber BV v Aslam* [30](Uber BV). The Parties made oral submissions that referred to the Uber BV judgement and three other decisions made in the United Kingdom jurisdiction that involved a company trading as Deliveroo in the United Kingdom. These decisions were firstly, a decision of the Central Arbitration Commission in *Independent Workers Union of Great Britain v Roofoods Ltd t/a Deliveroo* [31]; secondly, a High Court judgement in *Independent Workers Union of Great Britain v Roofoods Ltd t/a Deliveroo* [32] and finally, a further High Court judgement in *Independent Workers Union of Great Britain v Roofoods Ltd t/a Deliveroo* [33]. The Parties were provided with further opportunity to supplement oral submissions in respect of the United Kingdom decisions with further written material.

[136] The Commission has considered the respective submissions of the Parties concerning the United Kingdom decisions. The Uber BV judgement and the various decisions involving *Roofoods Ltd* involved determinations made in respect to particular statutory provisions that are quite distinct from the Australian common law position. These United Kingdom decisions are interesting, and they confirm the extent to which the engagement of workers to provide services for digital platform companies has challenged traditional concepts of employment. However, the United Kingdom decisions have not deflected consideration from adoption of the relevant principles that underpin the task of applying what I have referred to as the multifactorial test, the overall picture, and the binary outcome.

Conclusion - Employee or Contractor

[137] The various factors or indicia relevant to the proper characterisation that should be provided for the relationship between Mr Franco and Deliveroo have been carefully examined, evaluated, balanced, and considered. The established principles applicable to a determination of the common law question of whether a person is an employee, or an independent contractor have been applied in order to arrive at the resultant determination. An overall effect has been created when standing back from the detailed picture, and properly viewing all of the accumulation of detail from a distance. In this way, an informed, considered and qualitative appreciation of the whole picture has been obtained.

[138] In this case, when consideration of all the relevant indicia, has, like the colours from the artist's palette, emerged to form a complete picture, the correct characterisation of the relationship between Mr Franco and Deliveroo is that of employee and employer. Although, the picture is impressionistic and not precise, it is nevertheless a compelling conclusion, drawn from the answer to the question: Does the relationship between Mr Franco and Deliveroo look more like employment or does it look more like independent contracting?

[139] The conclusion that must be drawn from the overall picture which has been obtained, was that Mr Franco was not carrying on a trade or business of his own, or on his own behalf. Instead, he was working in Deliveroo's business as part of that business. Importantly, the level of control that Deliveroo possessed, and which it could choose to implement or withdraw, whilst not immediately apparent, when properly comprehended, represented an indicium that strongly supported the existence of employment rather than independent contracting. In addition, the fact that Mr Franco could and did work for competitors of Deliveroo, must be assessed in the context of a modern, changing workplace impacted by our new digital world. Mr Franco was, despite aspects of his relationship with Deliveroo including elements usually associated with that of an independent contractor, engaged in work as a delivery rider for Deliveroo as an employee of Deliveroo.

Harsh, Unjust or Unreasonable

[140] Mr Franco has been found to have been an employee of Deliveroo. Consideration then should logically turn to whether he was also a person protected from unfair dismissal.

[141] Section 385 of the Act stipulates that the Commission must be satisfied that four cumulative elements are met, in order to establish an unfair dismissal. Section 385 is in the following terms:

> ***"385 What is an unfair dismissal***
>
> *A person has been **unfairly dismissed** if the FWC is satisfied that:*
>
> *(a) the person has been dismissed; and*
> *(b) the dismissal was harsh, unjust or unreasonable; and*
> *(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and*

(d) the dismissal was not a case of genuine redundancy."

[142] In this instance, Deliveroo did not maintain any assertion that Mr Franco had not been dismissed, the Small Business Fair Dismissal Code was not applicable, and the dismissal was not a case of genuine redundancy. Consequently, only the provisions of subsection (b) of section 385 of the Act have relevance.

[143] The matter has therefore required further consideration in respect to that element contained in s. 385 (b) of the Act, being whether the dismissal of the applicant was harsh, unjust, or unreasonable. Section 387 of the Act contains criteria that the Commission must take into account in any determination of whether a dismissal is harsh, unjust or unreasonable. Section 387 of the Act is in the following terms:

"387 Criteria for considering harshness etc.

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the FWC must take into account:

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that the FWC considers relevant."

S. 387 (a) - Valid Reason for the Dismissal Related to Capacity or Conduct

[144] The reason that was stated for the dismissal of Mr Franco was "*Failing to deliver orders in a reasonable time is a breach of your supplier agreement.*"[34] The evidence that was provided by Ms Pratt, Deliveroo's Operations Supply and Support Manager, Australia, confirmed that in the four weeks prior to 23 April 2020, Mr Franco's RETs were in 96% of cases, slower than the expected RET. Further, Mr Franco's average actual RETs were 21% and 20% slower than comparable riders in the same zones. Consequently, the fundamental reason for dismissal was established as a matter of fact, that is, Mr Franco was, in the four

week period prior to his termination, delivering orders considerably slower than other comparable riders.

[145] However, a factual confirmation of the conduct or capacity that provided the reason for dismissal does not necessarily translate into a finding that the reason was valid. Conduct such as serious misconduct and other conduct that is plainly contrary to the continuation of the employment, may establish valid reason for dismissal upon factual confirmation of such conduct. However, other conduct which may be factually established could not represent a sound, defensible and well-founded reason for dismissal unless the employee was aware that the particular conduct would be relied upon as the basis for dismissal. For example, an employee may be consistently late for attendance at the workplace, but an employer may, by its inaction or some other indication, condone such lateness. Unless the employee was made aware that conduct of a nature that was not directly contrary to the continuation of employment, was to be relied upon as a reason for dismissal, such reason could not be a sound, well-founded and defensible reason for dismissal. Factual confirmation of the reason for dismissal does not necessarily translate into a valid reason for dismissal.

[146] In this case, Mr Franco was not provided with any clear indication of the delivery times that were expected of him. Deliveroo issued an email notification to Mr Franco on 3 February 2020, which inter alia, advised that it had noticed that a number of orders took longer to reach customers than expected. Although Mr Franco said that he did not receive this email, at no time prior to the termination of his services was he advised of the delivery times that were expected of him, and which would, if not achieved, be deemed unreasonable and the basis for dismissal.

[147] Therefore, for the conduct of Mr Franco whereby he failed to deliver orders in a reasonable time to represent a valid reason for dismissal, it would be necessary for there to have been evidence that Mr Franco was informed of the delivery times that were expected, and that if these expectations were not achieved it would represent basis for dismissal. The absence of clear identification of the required delivery time standards means that the failure to deliver orders in a reasonable time could not represent a reason that was sound, defensible or well-founded. Consequently, there was not a valid reason for the dismissal of Mr Franco related to his capacity or conduct.

S. 387 (b) - Notification of Reason for Dismissal

[148] Deliveroo provided notification of dismissal in the form of an email sent to Mr Franco at 1:20 pm on 23 April 2020. This email provided 7 days' notice of the termination of Mr Franco's supplier agreement.

[149] Notification of the termination of services, whether it be in employment or genuine independent contracting circumstances, is an issue of such significance that communication by way of email or other electronic communications should be strenuously avoided. Even in circumstances where the ordinary means of communication between the Parties is via email or other electronic messaging, the impact of the termination of services is a matter of such significance that basic human dignity requires that a matter of such gravity should be conveyed personally.

[150] In this case, it was regrettable to note that Ms Pratt confirmed that she was involved in terminating multiple accounts[35] and that she didn't feel the need to even phone Mr Franco[36] before issuing him with the email notification of the termination of his services. It appeared that the perfunctory, callous, approach to the termination of services was in large part, a manifestation of the apparent absence of the ordinary protections provided to employees as opposed to independent contractors. Further, the access that digital platform businesses have to extensive quantities of data and which provide the capacity for detailed examination of performance metrics, should not translate into a license to treat individuals, whether they be employees or contractors, without a level of fundamental, human compassion.

S. 387 (c) - Opportunity to Respond to any Reason Related to Capacity or Conduct

[151] Deliveroo acknowledged that it did not provide any opportunity for Mr Franco to respond or provide any form of explanation in respect of the identified slowness of his delivery times, prior to the email advice of the termination of his supplier agreement.

S. 387 (d) - Unreasonable Refusal to Allow a Support Person to Assist

[152] There was no evidence that Mr Franco was provided with an opportunity to allow him to have a support person present during any meeting that may have been held to discuss the potential for the termination of his supplier agreement because there was no evidence of any such meeting being held.

S. 387 (e) - Warning about Unsatisfactory Performance

[153] Deliveroo accepted that in an employment context, there was no warning provided to Mr Franco about any unsatisfactory performance. The dismissal of Mr Franco might be more appropriately characterised as being based upon unsatisfactory performance and the absence of any required delivery time standards represented a complete absence of warning about any unsatisfactory performance.

S. 387 (f) - Size of Enterprise Likely to Impact on Procedures

[154] Deliveroo is not a small business employer and the size of its enterprise should have enabled it to have adopted far more acceptable and professional employment related practices and procedures.

S. 387 (g) - Absence of Management Specialists or Expertise Likely to Impact on Procedures

[155] Deliveroo acknowledged that as a large organisation it did have access to internal expertise. Consequently, it was very regrettable that Deliveroo adopted a procedure whereby the decision to terminate the services of Mr Franco was taken without providing him any opportunity to be heard, provide explanation, offer any defence, or plead for mercy.

S. 387 (h) - Other Relevant Matters

[156] There were no other relevant matters identified as requiring consideration.

Conclusion

[157] This claim for unfair dismissal remedy has firstly involved significant consideration and determination of the question as to whether the applicant was an employee or independent contractor. Following detailed examination of all of the evidence regarding the relevant factors and application of the relevant common law principles, the Commission has determined that the applicant, Mr Franco, was an employee of the respondent, Deliveroo.

[158] Subsequent consideration as to whether the dismissal of the applicant was harsh, unjust or unreasonable, has established that there was no valid reason for the dismissal of Mr Franco relating to his capacity or conduct. The substantive reason for the dismissal of Mr Franco was not sound, defensible, or well-founded.

[159] The procedure that Deliveroo adopted whereby it advised Mr Franco of the termination of his services by way of email communication and without any proper, prior warning, was unjust, unreasonable, and unnecessarily harsh.

[160] In summary, the termination of Mr Franco's supplier agreement with Deliveroo was a dismissal from employment. The dismissal of Mr Franco was without valid reason involving established misconduct or capacity inadequacy. Further, the dismissal involved an entirely unjust and unreasonable process including the complete absence of any opportunity for Mr Franco to be heard before the decision to dismiss was made. Consequently, upon analysis of the various factors that are identified in s. 387 of the Act, an objective and balanced evaluation of all of the relevant circumstances has provided compelling basis to establish that the dismissal of Mr Franco was harsh, unjust and unreasonable. Therefore, the applicant's claim for unfair dismissal remedy has been established.

Remedy

[161] Mr Franco has sought reinstatement as remedy for his unfair dismissal.

[162] The question of remedy in respect of an unfair dismissal is the subject of Division 4 of Part 3-2 (ss. 390 - 393) of the Act. Section 390 of the Act is relevant to the consideration in this instance and is in the following terms:

> ***"390 When the FWC may order remedy for unfair dismissal***
>
> *(1) Subject to subsection (3), the FWC may order a person's reinstatement, or the payment of compensation to a person, if:*
>
> *(a) the FWC is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and*
>
> *(b) the person has been unfairly dismissed (see Division 3).*

(2) The FWC may make the order only if the person has made an application under section 394.

(3) The FWC must not order the payment of compensation to the person unless:
(a) the FWC is satisfied that reinstatement of the person is inappropriate; and
(b) the FWC considers an order for payment of compensation is appropriate in all the circumstances of the case."

[163] The Commission has carefully considered whether it would be appropriate to make Orders for the reinstatement of Mr Franco. The dismissal of Mr Franco, and the subsequent evidence of Mr Franco's involvement in the TWU "gig worker" campaign which inter alia, publicly criticised Deliveroo's alleged treatment of its riders, may have created some tension in the relationship between Mr Franco and Deliveroo.

[164] However, in circumstances where the nature of engagement of its riders does not involve Deliveroo management or supervision of particular individuals on a day-to-day basis, but instead utilises an online chat forum as the usual means of communication, many of the potential practical difficulties associated with any restoration of the employment relationship would be minimised. The level of remoteness between Mr Franco and Deliveroo management supports the conclusion that there has not been a genuine loss of trust and confidence such that the employment relationship could not be successfully and harmoniously re-established.

[165] Further, although some circumspection should be exercised in respect to public criticism of a former employer, Mr Franco had every justification for being aggrieved by the callous and perfunctory termination of his services, and any criticism of Deliveroo's conduct was understandable.

[166] In the particular circumstances of this case, the primary remedy of reinstatement would represent an appropriate and just rectification that reflected a termination that was most notable for its absence of compassion. Irrespective of whether Mr Franco was a contractor or an employee, it was plainly unconscionable to terminate what would be well understood to be his primary source of income, without first hearing from him. The capacity to undertake a detailed analysis of Mr Franco's performance statistics should not remove the human factor. Therefore, reinstatement would be appropriate in all of the circumstances of this case.

[167] Consequently, for the reasons stated above, the Commission has determined that Mr Franco was an employee of Deliveroo, and he was dismissed unfairly. Further, in respect to remedy for Mr Franco's unfair dismissal, Orders for his reinstatement, continuity of service, and to restore lost pay shall be made.

[168] Orders providing for the reinstatement of Mr Franco will be issued separately. In the event that the Parties are unable to agree on the amount to be paid to Mr Franco in accordance with Order 3, regarding an Order to restore lost pay, the application will be listed for further proceedings to enable the Commission to determine that amount. Any request for such further proceedings should be made within 21 days from the date of this Decision.

[169] Accordingly, separate Orders [PR729921] providing for unfair dismissal remedy in these terms will be issued.

COMMISSIONER

Appearances:

Mr P Boncardo, Counsel with *Ms A Owens-Strauss* from The Transport Workers' Union of Australia for the Applicant.

Mr M Felman, Counsel instructed by MinterEllison for the Respondent.

Hearing details:

2020.
Sydney and Melbourne (video hearing):
October, 20.
November, 23.

2021.
Sydney and Melbourne (video hearing):
February, 22

Printed by authority of the Commonwealth Government Printer

<PR729920>

---

1 On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3) [2011] FCA 366.

2 Gupta v Portier Pacific Pty Ltd [2020] FWCFB 1698.

3 Hollis v Vabu Pty Ltd t/a Crisis Couriers [2001] HCA 44, 106IR 80.

4 Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435.

5 ACE Insurance Ltd v Trifunovski and Others [2013] FCAFC 3 209FCR 146.

6 Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122.

7 Klooger v Foodora Australia Pty Ltd [2018] FWC 6836.

8 Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119.

9 Automatic Fire Sprinklers Pty Ltd v Watson (1946) 72 CLR 435.

10 Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16.

11 Hollis v Vabu Pty Ltd t/a Crisis Couriers [2001] HCA 44, 106IR 80.

12 ACE Insurance Ltd v Trifunovski and Others [2013] FCAFC 3 209FCR 146.

13 Dental Corporation Pty Ltd v Moffet [2020] FCAFC118.

14 Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 119.

15 Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122.

16 On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3) [2011] FCA 366.

[17] Howard v Merdaval Pty Ltd (trading as North Essendon Auto Spares) [2020] FCA 43.

[18] Abdalla v Viewdaze Pty Ltd (2003) 122IR 215.

[19] Jiang Shen Cai trading as French Accent v Michael Anthony Do Rozario [2011] FWAFB 8307; (2011) 215IR 235.

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

[21] Gupta v Portier Pacific Pty Ltd [2020] FWCFB 1698.

[22] Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122, (per Allsop CJ) @ 20.

[23] Ibid (per Lee J) @ 74.

[24] Ibid (per Lee J) @ 74.

[25] Ibid (per Lee J) @ 78.

[26] Gupta v Portier Pacific Pty Ltd [2020] FWCFB 1698 @ [64].

[27] Ibid @ paragraph 30 (5).

[28] Ibid (per Lee J) @ 169.

[29] Ibid (per Lee J) @ 117.

[30] Uber BV v Aslam [2021] UKSC 5.

[31] Independent Workers Union of Great Britain v Roofoods Ltd t/a Deliveroo TUR1/985(2016) 14 November 2017.

[32] Independent Workers Union of Great Britain v Roofoods Ltd t/a Deliveroo [2018] EWHC 1939.

[33] Independent Workers Union of Great Britain v Roofoods Ltd t/a Deliveroo [2018] EWHC 3342.

[34] Exhibit 9 @ page 593.

[35] Transcript @ PN1512.

[36] Transcript @ PN2069.