

Fair Work Ombudsman commences legal action against Foodora

NOTE (21/12/2018): On 17 August 2018, Foodora Australia Pty Ltd (Foodora) appointed voluntary administrators. Pursuant to section 440D of the Corporations Act 2001 (Cth), the Fair Work Ombudsman's proceedings against Foodora could not continue during the administration of Foodora, without the leave of the Federal Court or the administrator's written consent. Following confirmation by the Fair Work Ombudsman that it did not intend to seek for the proceedings to continue during the administration of Foodora, on 3 September 2018 the Federal Court made orders vacating the Court timetable. On 3 December 2018, Foodora entered into a deed of company arrangement. On 19 December 2018, by consent, the Court adjourned the proceedings for a period of six months.

12 June 2018

The Fair Work Ombudsman has commenced legal proceedings involving the gig economy, alleging that food delivery company Foodora Australia Pty Ltd (Foodora) engaged in sham contracting activity that resulted in the underpayment of workers.

The legal action, filed in the Federal Court, relates to two bicycle delivery riders who delivered food and drinks to customers in Melbourne and a delivery driver who delivered food and drinks by car to customers in Sydney.

The Fair Work Ombudsman alleges that when Foodora engaged the three workers in 2015, and during periods in which they performed work in 2016, Foodora breached sham contracting laws by misrepresenting to them they were independent contractors when they were in fact employees of Foodora.

The Melbourne workers were juniors aged just 19 at the time, while the Sydney worker, an Indian migrant who is now an Australian permanent resident, was aged 30 at the time.

It is alleged that Foodora required each of the workers to have an Australian Business Number (ABN) and sign a contract titled 'Independent Contractor Agreement' on the commencement of work.

The Fair Work Ombudsman examined the nature of the relationship between Foodora and the three workers using the multi-factor test to consider whether workers were 'employees' entitled to minimum wages and conditions under the Fair Work Act or 'independent contractors'.

Having applied the tests, the Fair Work Ombudsman alleges the three workers were actually employees of Foodora during the relevant period for a range of reasons, including:

- the level of control, supervision and direction Foodora exercised over the workers' hours, location and manner of work;
- the requirement for the workers to wear a Foodora-branded t-shirt and use food storage boxes and/or bike racks supplied by Foodora;
- Foodora paid the workers fixed hourly rates and/or amounts per delivery and the workers did not negotiate their rates of pay at any time; and
- each of the workers was not genuinely conducting their own delivery business, in that they: did not advertise or promote their availability to perform deliveries to the public; did not delegate their delivery duties with Foodora to any other person; and did not have their own customer base, business premises and insurances.

The Fair Work Ombudsman alleges that the workers were lawfully entitled to receive the minimum wage rates and entitlements that applied to their positions under the Fast Food Industry Award 2010; and that the amounts Foodora paid them were not sufficient to meet those rates and entitlements.

As a result of its investigation, the Fair Work Ombudsman allegedly found that the employees had been underpaid their minimum lawful wage rates, casual loading and penalty rates for night, weekend and public holiday work.

It is alleged that the three workers suffered a loss of \$1,620.74 over a four-week period. Additionally, it is alleged that Foodora failed to make any superannuation contributions on behalf of the three workers.

Most of the underpayment - \$1,168.50 - relates to the Sydney delivery driver, who worked significantly more hours than the two

Melbourne workers over the four-week period.

Fair Work Ombudsman Natalie James says sham contracting is a priority for her Agency, not just because of the direct impact of these arrangements on individual workers but because those adopting sham contracting as a business model are availing themselves of an unfair competitive advantage by depriving workers of their lawful minimum employment conditions and protections.

“Relevant to the decision to litigate in this case is the extent to which contracting arrangements are utilised by this significant business,” Ms James said.

“There has been broad community and academic debate about the status of 'models' using smartphone-driven technology as a means for deploying a workforce that delivers food to consumers from restaurants and fast food outlets.

“The only way to answer the question of whether the workers delivering the meals are employees or ‘independent contractors’ is for someone to ask a court to consider the specific 'relationships' between a company and its workers.

“As the national workplace relations regulator, the Fair Work Ombudsman is now putting this question of significant public interest before a court to consider.”

Ms James says all businesses, including those in the gig economy, that treat the individuals who perform work for them as independent contractors must take great care to ensure that the reality of the relationship matches the label.

“Courts have found again and again that merely labelling the relationship to be one of independent contracting does not make it so, and it is the substance of the relationship that decides the status of the workers and the regulatory requirements that flow,” she said.

“The activity of delivering food from restaurants and fast food outlets to customers is not new, and nor is the 'test' for what determines who is and is not an employee entitled to award rates.”

The Fair Work Ombudsman alleges Foodora committed several breaches of the Fair Work Act. The company faces penalties of up to \$54,000 per contravention.

The Fair Work Ombudsman is also seeking a Court Order for Foodora to back-pay the workers in full and make superannuation contributions on their behalf. A case management hearing has been scheduled in the Federal Court in Sydney for July 10.

Employers and employees seeking assistance can visit www.fairwork.gov.au, where information is available in 40 languages, or call the Fair Work Infoline on 13 13 94. Small business callers can opt to receive priority service via the Small Business Helpline and an interpreter service is available on 13 14 50.

Information on the website includes a detailed explanation of the difference between employees and contractors and advice about the factors to consider when determining the correct category for a worker.

Follow Fair Work Ombudsman Natalie James on Twitter [@NatJamesFWO](https://twitter.com/NatJamesFWO) , the Fair Work Ombudsman [@fairwork_gov_au](https://twitter.com/fairwork_gov_au) or find us on Facebook www.facebook.com/fairwork.gov.au .

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Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: 13 13 94

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Hearing & speech assistance

Call through the National Relay Service (NRS):

For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94

Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94

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