Food Delivery Drivers Open to Unionization - Expanding Labour Relations to E-commerce

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On February 25, 2020, the Ontario Labour Relations Board (the “Labour Board”) delivered a crucial decision regarding Foodora, an online food delivery service that had contracted with independent bike couriers to deliver restaurant food to patrons. Foodora is one of the many “app” delivery service companies of the modern urban “gig-economy.”

The Labour Board determined that Foodora’s independent bike couriers were “dependent contractors” as defined under the Labour Relations Act, 1995, meaning that they could be considered to be a group that could be organized by a union and entitled to collective bargaining and collective agreement protections from Foodora, even though the couriers were not employed under a contract of employment or exclusive to Foodora.

As part of its web-based service to connect restaurants (not typically known for at-home delivery), Foodora provided an online food ordering/catering service that utilized independent couriers to provide door-to-door food delivery. The company recruited the individual couriers through its website and connection to its software delivery application, under written agreements which expressly described these couriers as independent contractors (businesses of their own).

In reaching their decision, the Labour Board relied on several relationship factors that it had historically considered when interpreting the labour relations definition of a “dependent contractor.” In the Foodora case, some of the more significant factors relied on by the Labour Board that highlighted their “dependence” included the following:

- The fact that Foodora restricted its couriers from using helpers or substitutes;
- The single most important tool used by the couriers, the Foodora app, was owned and controlled entirely by Foodora;
- The couriers were integrated into Foodora’s business and were found to be dependent upon the Foodora App;
- Foodora imposed restrictions on the couriers’ ability to use their own business “skill” to improve their individual profits by preventing them from running their own ads or promotions, or from developing individual relationships with customers or restaurants. This also had the effect of reducing independent competition in the market space, notwithstanding Foodora’s control over the app;
- Foodora placed contractual limitations on the couriers that restricted their opportunity to use other (competitive) web or app-based platforms;
- Foodora used GPS tracking technology that enabled them to track and report issues with couriers, as well as discipline mechanisms that ensured Foodora maintained control of the manner through which the couriers operated;
- The couriers had no mechanism to affect how Foodora determined the fees it would pay; and
- Foodora had a complex system of incentives and restrictions that restricted the economic mobility and independence of the couriers.
The Labour Board determined that these restrictions bore the hallmarks of the type of employment relationship often seen in the form of an on-call employee or elect-to-work employee and created an economically-dependent relationship, concluding that “in a very real sense, the couriers work for Foodora, and not themselves.”

While this decision is significant with respect to demonstrating how independent and disparate workers in the modern “gig” economy can organize as an option to obtain bargaining leverage, the Labour Board noted that the underlying services and contractual relationship that characterized this type of Foodora worker was not, in fact, new. The Labour Board has long dealt with similar questions of dependent contractors, in many different economic sectors and businesses, who have sought to unionize in order to gain negotiating leverage.

However, the decision is a clear sign that the Labour Board does not consider e-business and app-based businesses to be unique, and a clear warning has been given to other similar app/web-based companies and workers. This decision should also serve as a caution to companies seeking to engage individuals as independent contractors as opposed to employees. As it has been in the past, the substance of the relationship is more important than the written agreement and the parties’ intentions, and any relationship that creates or leads to dependence creates employment issues and the risk of organization and unionization.

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