Unionizing Foodora - Strident Labour Laws into the Gig Economy?

By: Jeremy Schwartz

The Ontario Labour Relations Board (the "**Board**") issued a decision yesterday which sent shockwaves through the Gig Economy. The Board ruled that Foodora couriers' relationship with the app-based food delivery company was more akin to that of "employees" than that of "independent contractors".

What the Decision Does and Does Not Say

First things first: the decision does not automatically apply to all app-based employees, or even to all app-based couriers and drivers. As the Board's decision made perfectly clear at the outset, the analysis is highly fact-specific.

So, let's review some of the key facts. The Board found that:

- Foodora couriers went through an on-boarding process, during which they completed online forms, demonstrated that they had the necessary vehicle, thermal bag and safety equipment and reviewed certain rules and FAQs. There was no "interview" per se. However, Foodora validated their submissions through various means and could (and did) require non-compliant items to be addressed before enrollment.

- In addition to owning their vehicle, bag and safety equipment, couriers owned their own cell phones and paid for all related insurance, service plans and maintenance themselves.

- Foodora owned and operated the app, and had sole control over its operation.

- Foodora set and amended from time-to-time the terms of the contract without consulting with couriers. Although the company asserted couriers could propose amendments, in practice that had never happened.

- Couriers were paid on a per delivery basis and KM adjustment basis, and had no ability to negotiate the rate or contingencies other than to request adjustments to the KM rate where discrete conditions (ie. parades and other events) caused unforseen delays etc. Foodora had the ultimate say whether to approve an increase and the amount.

- Foodora offers a base $16/hour "guarantee" for couriers who meet the minimum metrics established by contract, by "topping up" drivers who earned less based on orders and KM

fees (because of a lack of orders, not performance). If orders are delayed 25 minutes or more, couriers receive $5 for their trouble (if the dispatcher approves).

- Foodora takes no deductions and couriers are responsible for all other own taxes and remittances.

- Apparently, Foodora is registered with WSIB for its couriers (though there is little discussion of this in the decision). In particular, there was no evidence before the Board of any prior WSIB claims for benefits.

- Couriers were scheduled for "shifts" based upon their history and reviews. The most highly rated drivers were given first pick of shifts. Other, less favourable shifts were doled out later and based on rankings. Ultimately, couriers who don't take enough shifts, or who fail to meet expectations can be further penalized in the ranking and ultimately may be deactivated from the platform entirely.

- Couriers were permitted to cancel a shift with 24 hours' notice. However, couriers that cancelled a shift with less than 24-hours' notice (who did not swap with other couriers) were 'penalized' by dropping their place in priority sequence (essentially) for more favourable shifts.

- The schedules and decisions whether to add a shift etc. were governed by Foodora dispatchers. Couriers who wanted additional shifts could ask dispatchers, but dispatcher approval was required before a shift could be added and orders sent to the courier.

- Couriers can take a break at any time between orders but must advise dispatch they are on break. However, the break is not in effect until the dispatcher approves and marks them offline. Foodora would 'administratively' place couriers on a 1-minute break when they declined an order, apparently to prevent the system from dispatching them the same order. Although, there was some dispute about whether this was a punitive measure.

- Couriers could be reassigned or re-dispatched to different delivery areas, with dispatch approval. However, until dispatch confirmed the assignment/area, couriers were not permitted to refuse assignments and orders in the area (without that affecting rankings etc.).

- Pseudo-progressive discipline, in the form of a "strike" system, logged in the couriers' profile when they performed poorly, went off assignment or caused delays, interacted poorly with dispatch, etc. More serious incidents, such as theft and assault, were considered "high strikes," and would lead to intervention by management and potentially removal from the platform.

- When orders came up, an algorithm sent the order to the closest available courier (generally), who could then accept or decline.

- Foodora acts as intermediary between the end-customer, restaurant and the courier.

- Couriers were free to work for other apps companies (and other employers for that matter), and many did. There were no restrictions on including logos of competitors on the food bag or vehicles, for example. However, until the spring of 2019, couriers were prohibited from 'dual-apping,' which means simultaneously running and juggling two apps. Some drivers admitted to this practice, but kept it secret for fear of consequences.

- Couriers were not free to use substitutes, or to hire their own employees and dispatch them to multiple order locations.

"Dependent Contractors"

The Board found that the relationship indicia more closely resembled that of an employment relationship. The Board focused not only on the ownership of the app, but also on the degree of control exercised through dispatch and by contract and operating structure.

Typically analyzed factors, such as scheduling, ultimate discretion over areas and ranking, essentially non-negotiable contractual terms and rates of compensation, and even a pseudo-form of 'progressive discipline' through the "strike" system, clearly suggested a more dependent relationship. Substitute 'Foodora courier' with just about anyone with those indicia present, and it wouldn't surprise us to see the Board ruling as much.

Essentially, the entrepreneurial activity was kept out of the hands of the couriers – in some cases by dispatch, in others by algorithm – but in virtually no way could one say these couriers are in business for themselves.

Looking Forward

This is not the first time the Board has considered whether drivers, couriers or other "independent contractors" were in-fact "employees" or "dependent contractors" within the meaning of the Ontario *Labour Relations Act, 1995*. It will not be the last.

However, it is the Board's focus, on the manner and systems for doing business instead of the ownership of the physical delivery tools, that should send shivers down the back of any app-based business with similar structure.

Some of this may be mitigated by returning control and entrepreneurial opportunity to the contractors. This may be incompatible with the structure and financial plans of many app-based frameworks.

Foodora couriers have won the right to seek to unionize – their fight is not over. We and our counterparts at other management-side labour and employment firms will be picking over this

decision in much greater detail to advise our clients, app-based and brick-and-mortar, about where the evolution of labour law may be taking us on this central issue to labour relations.

Join us on Friday, February 28 from 12-1pm for an interactive webinar on this watershed decision and the adaptation of labour law to the gig economy.

For more information contact:

Jeremy D. Schwartz at jschwartz@stringerllp.com or 416-862-7011

UPDATE is an electronic publication of Stringer LLP
390 Bay Street, Suite 800, Toronto, Ontario M5H 2Y2
T: 416-862-1616 Toll Free: 1-866-821-7306
E: info@stringerllp.com I: www.stringerllp.com