

The implications of the new dynamic on the gig economy

- Claire Browne, Associate (Toronto)
Craig Lawrence, Partner (Toronto)

Overview

- Review of the three categories of workers
- Significance of the classification of workers
- Test for determining the appropriate classification of workers
- Implications of the misclassification of workers
- Where do gig economy workers fit in?
- Case law update
 - *Thurston v Ontario (Children's Lawyer)*, 2019 ONCA 640
 - *Canadian Union of Postal Workers v Foodora Inc.*, 2020 CanLII 16750
 - *United Food and Commercial Workers International Union v Uber Canada Inc.*, 2020 CanLII 54980
- Key takeaways and best practices

Three categories of worker:

Category #1 – Independent Contractor

- Individual who is in business for themselves on their own account
- Determines how, when and where the work is performed
- Provides their own tools to complete the work
- Decides whether to subcontract some of the work
- Has the opportunity to make a profit and the risk of losing money from the work
- Not subject to discipline by the business enlisting the work

Three categories of worker:

Category #2 – Employee

- Individual who performs work or provides services to an employer for wages
- Work performed by the individual constitutes an important part of the employer's business
- Employer, or business, determines:
 - Work performed by the individual
 - Amount the individual will be paid
 - When and where the work is performed
- Employer, or business, provides the individual with tools, equipment and materials to perform the work
- Individual cannot subcontract their work to someone else
- Employer, or business, has the right to suspend, dismiss or otherwise discipline the individual

Three categories of worker:

Category #3 – Dependent Contractor

- Intermediary between independent contractors and employees
- Individual who performs work or services for another person in a manner that closely resembles the relationship of an employee
- Two key characteristics
 - Individual is in a position of **economic dependence** upon the other person or business
 - Individual is under an **obligation to perform duties** for the other person or business
- Status is determined by application of common law tests
- Entitled to unionize

Significance of classification of workers – Why does it matter?

Independent Contractors

- Not covered by employment standards legislation
- Not subject to normal payroll deductions - responsible for their own tax remittances
- Not entitled to common law reasonable notice of termination

Employees

- Covered by employment standards legislation
- Employers are required to make payroll deductions from employees' pay
- Entitled to reasonable notice of termination
- Employers may contribute to workers' compensation programs
- Right to unionize

How do we determine the appropriate classification of workers?

- There is no single conclusive test that can be applied to determine the appropriate classification of a worker
- Courts, tribunals and decision makers evaluate the totality of the relationship between the parties on a case-by-case basis
- Factors considered include:
 - Level of control the employer has over the worker's activities
 - Whether the worker provides his or her own tools and equipment
 - Whether the worker can hire individuals to assist with performing the work
 - Degree of economic mobility or independence
 - Degree of financial risk taken by the worker and opportunity for profit
 - Degree of integration into the employer's business
- Fundamental determination: whether the individual is performing services as a person in business on his or her own account

Implications of misclassification of workers

- Penalties, prosecution or both imposed by an employment standards officer against the employer
- Liability for minimum standards entitlements
 - Ex. Unpaid wages, overtime pay, vacation pay, holiday pay or termination pay
- Liability for unremitted statutory deductions and withholdings
 - Ex. Income tax, CPP/EI contributions, workers' compensation premiums
- Claims for wrongful dismissal damages following termination of employment
- Unionization campaigns
- Class action proceedings

Where do gig economy workers fit in?

- Individuals who obtain work through a form of digital labour platform
 - Work is performed “on demand”
 - Workers make themselves available to complete work as it becomes available
- 2016: Gig workers represented about **8-10%** of all Canadian workers
- Two main categories of “gig worker” in Canada
 - Complete gig work to supplement wage employment or salaries
 - Do not earn any wages or salaries and rely primarily gig earnings
- Growth of the gig economy has led to:
 - Increased uncertainty regarding the appropriate classification of gig economy workers
 - Increased number of class action proceedings

Thurston v Ontario (Children's Lawyer), 2019 ONCA 640

- Applicant worked for the Office of the Children's Lawyer ("OCL") for 13 years through a series of fixed-term contracts
- Each fixed-term contract did not include a right of automatic renewal
- Applicant also maintained a separate legal practice while working for the OCL
- Work at the OCL constituted an average of 39.9% of the applicant's annual billings
- OCL provided the applicant with notice that her contract would not be renewed
- Applicant brought a claim for wrongful dismissal and damages for reasonable notice of termination

Thurston v Ontario (Children's Lawyer), 2019 ONCA 640

- Motion judge determined the applicant was a dependent contractor
- However, the Ontario Court of Appeal determined the applicant was **not** a dependent contractor
 - Dependent contractor status is a non-employment relationship in which there is “a certain economic dependency, which may be demonstrated by a complete or near-complete exclusivity”
 - Although near-complete exclusivity cannot be reduced to a specific number that determines dependent contractor status, near-exclusivity necessary requires **substantially more than 50% of income**
 - Additional factors may also be relevant in determining economic dependency

Canadian Union of Postal Workers v Foodora Inc., 2020 CanLII 16750

- The Canadian Union of Postal Workers (“CUPW”) filed an application for certification
 - CUPW sought to be the exclusive bargaining agent for a group of couriers working in Toronto and Mississauga for Foodora Inc. (“Foodora”)
- Foodora is a web services company that provides an online marketplace platform connecting consumers to restaurants
 - Couriers use an application to access Foodora’s dispatch system
 - Foodora charges restaurants and customers directly for its services
 - Restaurants and customers do not have direct access to couriers
- Ontario Labour Relations Board (“OLRB”) considered whether the individuals subject to the application were dependent contractors or independent contractors

Canadian Union of Postal Workers v Foodora Inc., 2020 CanLII 16750

- OLRB determined Foodora couriers were dependent contractors and therefore eligible for unionization under the Ontario *Labour Relations Act, 1995*
- OLRB considered a number of factors traditionally applied while determining the status of a worker, including:
 - Use or right to use substitutes
 - Ownership of tools, equipment, appliances or the supply of materials
 - Evidence of entrepreneurial activity
 - The selling of one's services to the market generally
 - Economic mobility or independence
 - Control of the manner and means of performing the work
- Essential question: Do the individuals more closely resemble the relationship of an employee or that of an independent contractor?

United Food and Commercial Workers International Union v Uber Canada Inc, 2020 CanLII 54980

- Ontario Labour Relations Board considered whether the scope of the bargaining unit proposed by the union should include:
 - All drivers in the geographic area described in the Primary Unit who used the Uber Black Car App on the application date; and
 - All drivers in the geographic area described in the Primary Unit who did not use the Uber Black Car App on the application date but:
 - Used the App at least once prior to the application date; and
 - Had a current Uber App account as of the application date
- Uber is a technology platform that operates through two smartphone applications available for download by riders and drivers
- Uber Black and Uber Black SUV are premium luxury ride options within the Uber platform

United Food and Commercial Workers International Union v Uber Canada Inc, 2020 CanLII 54980

- OLRB determined the temporal period must be limited to drivers who had a sufficient connection to the workplace at the time the decision about unionization was being made
- Key principle: Employees who have a stake in the work that would fall within the proposed bargaining unit ought to have a say in whether they will be represented by the union
- OLRB is required to examine the relationship of the employees within the context of the work environment
- OLRB considered the factors applicable to casual employees
 - Analysis did not change due to the use of new technology as the fundamental decision involved similar factors to circumstances traditionally contemplated by the OLRB
- However, the effect of the technology utilized was also an important consideration

Key Takeaways – How can employers minimize their risk?

- There is no single test for the classification of workers
 - Determinations are extremely fact specific
- Broader trend towards extending employment or employment-like rights to forms of work conducted in the gig economy
 - Aim: to protect workers considered to be in “precarious working conditions”
 - May result in shifts regarding how businesses in the gig economy continue to operate
- Complete a thorough review of agreements, practices and policies regarding employment relationships with workers
 - Do not rely on generalizations or labels to determine classification
 - Ensure arrangement satisfies courts’ criteria
- Promptly correct any instances of misclassification

Thank you



Craig Lawrence
Partner, Toronto
+1 416 863 4420
craig.lawrence@dentons.com



Claire Browne
Associate, Toronto
+1 416 367 7745
claire.browne@dentons.com