The Gig Economy In Canada: Emerging Issues And The Future Of Work

Courts in Canada are starting to tackle some of the issues that arise from the informal and atypical work arrangements in the gig economy.

People have always engaged in non-standard work arrangements. Today, however, driven in part by the growth of digital intermediary platforms like ridesharing and food delivery applications, non-standard work arrangements have exploded into the mainstream. As the modern workplace continues to evolve, the existing understanding of the relationship between 'employers' and 'employees' is facing new scrutiny. Several recent cases have focused public attention on this issue, highlighting some of the employment-related challenges that organisations may face in this new world of work.

The gig economy

The 'gig economy' is a term that describes the growing market for certain non-standard work arrangements, whereby organisations contract with independent contractors for short-term engagements. The idea of a gig economy encompasses all manner of such non-standard work arrangements, including part-time, temporary, contract, freelance, self-employed and unpaid positions. However, the term is most frequently used to describe work associated with digital applications or online intermediary platforms.

The work arrangements associated with the gig economy have generally been framed as independent contractor relationships. These arrangements permit individuals greater control and flexibility in their work lives while organisations gain access to a flexible and competitive labour source.

In recent years, however, gig economy workers have launched a number of legal proceedings that have revisited the question of what makes someone an 'employee' in the modern workplace.

Are platform workers entitled to employment standards protections?

The answer to this question is still to be determined by the Court in *Heller v. Uber Technologies*, a now certified class action proceeding about whether Uber Eats drivers are 'employees' or independent contractors. The class action is aimed at securing certain benefits under the Ontario Employment Standards Act, 2000 ('ESA'), including

minimum wage and vacation pay, on behalf of a class of Ontario Uber Eats drivers, currently classified by Uber as independent contractors, without access to the ESA.

Most recently, in response to Uber's challenge to stay the class action proceeding because of a mandatory arbitration clause, the Supreme Court of Canada (the 'SCC') held that it was the Ontario courts, not an arbitrator in the Netherlands, that will decide the issue. The SCC refused to enforce what it found to be an improvident bargain reached between Uber and the drivers, resulting from an inequality of bargaining power. The SCC referred to the agreement as a classic case of unconscionability. For reference, the arbitration provision required any dispute to be resolved in Amsterdam, with an upfront payment of USD 14,500 in administrative fees to access the arbitration process. Practically, drivers had no way of resolving any dispute with Uber if the clause was enforced.

The *Heller* class action continues in Ontario, leaving the issue of the employee status of gig economy workers under employment standards legislation to be determined by the courts.

Can gig economy workers unionise?

In the recent Ontario Labour Relations Board case of *Canadian Union of Postal Workers v Foodora*, which considered employment status of gig economy workers, the answer was 'yes.' CUPW was certified as the bargaining agent of Foodora couriers in Toronto and Mississauga on the basis that they were dependent contractors (and therefore fell within the definition of 'employees') within the meaning of the Ontario Labour Relations Act.

Despite the ability of Foodora couriers to control their work hours, work location, and provide services to other companies, the Board held that, among other factors, restrictions on subcontracting, Foodora's ownership and control over the Foodora App, and the system of incentives and restrictions controlling courier behaviour, strongly resembled a part-time employment relationship.

The Board rejected an approach focused on a numerical threshold of Foodora-sourced income in assessing contractor status, finding that at the end of the day, the couriers worked for Foodora, not for themselves. The couriers, having been determined to be employees of Foodora for labour relations purposes, ultimately voted to unionise the company, although Foodora had ceased operating in Ontario by the time the ballots were counted. The Board's decision in *Foodora* could have a significant impact on the understanding of the relationship between organisations and workers in the broader gig economy, especially in Ontario in light of the ongoing efforts to certify Toronto Uber Black drivers.

However, the British Columbia Labour Relations Board declined to address the issue in *Lyft Canada Inc. v. United Food and Commercial Workers International Union*, Local 1518, where the UFCW had sought a declaration that Lyft and Uber drivers were dependent contractors in anticipation of a possible certification application. The Board dismissed the application without deciding the issue of driver status, leaving the question about whether gig economy workers are capable of organising in BC open.

Looking ahead

The worker-driven challenges to the traditional understandings of 'employee' in the context of the gig economy that are currently making their way through legal channels will have a significant impact on the modern workplace, whatever their outcome.

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