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## Rajab Suliman v Rasier Pacific Pty Ltd: Employee or Independent Contractor?

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## CASE NOTE

### ***RAJAB SULIMAN V RASIER PACIFIC PTY LTD: EMPLOYEE OR INDEPENDENT CONTRACTOR?***

JACQUES DUVENHAGE\*

#### I INTRODUCTION

The *Fair Work Act 2009* (Cth) ('FWA') provides statutory protection to persons who are national system employees, whether engaged in full-time, part-time or casual employment, and who have been unfairly dismissed.<sup>1</sup> Independent contractors do not fall within the scope of the FWA provisions. However, since the introduction of Uber and the increase in Uber drivers in Australia,<sup>2</sup> the vexed question of whether Uber drivers, and similar share-ride workers, are employees for the purpose of unfair dismissal claims has arisen and remains controversial. With the rapid rise of the gig economy<sup>3</sup> and digital-based business models, traditional employment relationships are gradually changing to different kinds of employment relationships characterised by greater casualisation, flexibility, independence, transience and mobility. As Dosen and Graham note the '[t]raditional paradigm of full-time, stable individual employment is being challenged by on-demand freelance contract work' with the consequence that 'certain protections and benefits that employees usually enjoy are not afforded to workers in the gig economy'.<sup>4</sup> Therefore, while the gig economy creates new and interesting job opportunities it also brings with it fewer employment benefits and protections, as highlighted in the recent case of *Rajab Suliman v Rasier Pacific Pty Ltd*.<sup>5</sup>

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<sup>1</sup> *Fair Work Act 2009* (Cth) s 380, s 381 and s 385. The definition of an employee can be found under ss 13 and 380 of the *Fair Work Act 2009* (Cth). *Fair Work Act 2009* (Cth) s 13 states: 'A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement'. Therefore, an employee includes full-time, part-time and casual occupations.

<sup>2</sup> See, eg, Simon Evans, *Uber on the Rise in Corporate Australia*, Australian Financial Review (Webpage, 22 May 2019) <<https://www.afr.com/technology/uber-on-the-rise-in-corporate-australia-20190521-p51prk>>; Sharon Masige, *Uber is Now More Popular than Taxis in Australia – and its Growth is Being Driven by Tech-savvy Millennials*, Business Insider (Webpage, 27 August 2019) <<https://www.businessinsider.com.au/uber-is-now-more-popular-than-taxis-in-australia-and-its-growth-is-being-driven-by-tech-savvy-millennials-2019-8>>.

<sup>3</sup> The 'gig economy' is one that 'employs an economic model in which temporary and flexible jobs are the norm in which companies hire contractors for on-demand work' (n 4) 1.

<sup>4</sup> Igor Dosen and Michael Graham, 'Labour Rights in the Gig Economy' (Research Note No 7, Department of Parliamentary Service, Parliament of Victoria, June 2018) <<https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13869-labour-rights-in-the-gig-economy-an-explainer>>.

<sup>5</sup> [2019] FWC 4807 (12 July 2019). See Martin Mallon, 'Protecting Platform Workers in the Gig Economy: Look to the FTC' (2018) 15 *Indiana Law Review* 377-80.

The key legal issue in this case<sup>6</sup> was whether the applicant was an employee of Rasier Pacific ('Uber') or an independent contractor in light of the Services Agreement signed between Uber and Mr Rajab Suliman ('Mr Suliman'), and if he could bring a claim for unfair dismissal under the FWA in the Fair Work Commission ('FWC'). Consequently the FWC was required to interpret the terms and conditions attached to the Uber 'Partner App' and its application, and assess the nature of the employment relationship. To this end, the FWC, and a court, is required to take into account a number of indicia in order to distinguish between employees and independent contractors. This is a key consideration in any unfair dismissal case given that the unfair dismissal provisions under the FWA only apply to *employees*. The first part of this case note therefore considers the employment relationship and the traditional multi-factorial test employed to distinguish between employees and independent contractors as relevant to the case. The second part will provide specific background and context to the unfair dismissal dispute and key issues in *Rajab Suliman v Rasier Pacific Pty Ltd*. Lastly, this note will offer a number of observations in respect of the Uber-driver relationship when relying on the FWA and unfair dismissal provisions.

## II THE EMPLOYMENT RELATIONSHIP AND UNFAIR DISMISSAL CLAIMS

### *A Background to Uber*

The ride-sharing service provided by Uber has been in use in Australia for the last six years with more than 20% of the Australian population utilising this service at the end of 2018 as an alternative means of transport.<sup>7</sup> The operation of the Uber service is described below. It is evident that Uber has achieved a successful introduction to the Australian market. With lower costs and more efficiency in the process,<sup>8</sup> Uber is increasingly used as an alternative means of transport to taxis.<sup>9</sup> However, it is not only a ride-sharing service provider simply for travelling

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<sup>6</sup> [2019] FWC 4807 (12 July 2019). See Martin Mallon, 'Protecting Platform Workers in the Gig Economy: Look to the FTC' (2018) 15 *Indiana Law Review* 377-80.

<sup>7</sup> Paul Smith, *New Uber Boss Aims Big as Cab Industry Strikes Back*, Australian Financial Review (Webpage, 26 November 2019) <<https://www.afr.com/technology/new-uber-boss-aims-big-as-cab-industry-strikes-back-20191117-p53bet>>; Roy Morgan, 'Uber Drives Forward while Taxis Stall and New Market Entrants Begin to Accelerate', (Web Page, 26 April 2019) <<http://www.roymorgan.com/findings/7959-ride-sharing-uber-taxis-december-2018-201904260833>>. Uber Pacific Holdings BV is a company registered in the Netherlands and trades under the name Uber Pacific Holdings in Australia. For a further description on Uber and the gig economy, see *Uber B.V. v Yaseen Aslam* [2018] EWCA Civ 2748.

<sup>8</sup> Deloitte (n 2) 21, 24.

<sup>9</sup> *Ibid.* Also consider Francis P Tiopianco, 'Rethinking Regulation: Uber and the Ride-Sharing Industry' (2015) 89 *Philippine Law Journal* 666-86.

purposes. In 2016, the Uber franchise expanded its services to Uber Eats focusing on food-to-door delivery services.<sup>10</sup>

The nature of the ride-sharing industry has created a number of employment opportunities for Australians; however, this has also raised legal issues about the nature of the employment relationship between Uber and its drivers. The key issue in this case being whether Mr Sullivan was an employee or an independent contractor in relation to his claim for unfair dismissal.

### B *The Employment Relationship*

In order to understand the relationship between Uber and its drivers, it is constructive to briefly outline the general nature of the employment relationship, and the distinction between employees and independent contractors. The employment relationship is determined through the existence of an employment contract but also various statutory instruments.<sup>11</sup> Accordingly, Pittard and Naughton note that:<sup>12</sup>

The employment relationship is a complex legal arrangement, its sources are numerous and the legal obligations which arise under it on the part of both employers and employees are diverse and often difficult to define.

Therefore, determining whether there is an existing employer-employee relationship may be challenging in itself,<sup>13</sup> and this is especially so in relation to workers in the gig economy such as Uber drivers.<sup>14</sup> This type of work relationship may create grey areas in terms of whether an

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<sup>10</sup> John McDuling, 'UberEATS, Uber's Home Delivery Service, Is Coming to Australia', *Sydney Morning Herald* (online, 26 February 2016) <<https://www.smh.com.au/business/companies/ubereats-ubers-home-delivery-service-is-coming-to-australia-20160225-gn3iem.html>>. Other delivery service providers include Foodora (who since exited the Australian market), MenuLog and Deliveroo.

<sup>11</sup> These include the *Fair Work Act 2009* (Cth), industrial awards and/or agreements.

<sup>12</sup> Marilyn Pittard and Richard Naughton, *Australian Labour Law: Text, Cases and Commentary* (LexisNexis, 5<sup>th</sup> ed, 2010) 41; Andrew Stewart et al, *Creighton & Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016) 193-6.

<sup>13</sup> This was highlighted by Bromberg J in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No 3)* (2011) 279 ALR 341 [205] when the employment relationship was described as 'an animal too difficult to define but easy to recognise when you see it' quoting Lord Wedderburn, *The Worker and the Law* (Penguin, 1986) 116.

<sup>14</sup> See for example the discussion on gig economy workers in Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32 *Australian Journal of Labour Law* 4, 7-8; Kim Ostergaard and Soren Sandfeld Jakobsen, 'Platform Intermediaries in the Sharing Economy: Questions of Liability and Remedy' (2019) 1 *Nordic Journal of Commercial Law* 20 in which the authors state that: 'In sharing economy services where the contractual relationship between the intermediary platform and the performance debtor may in fact constitute an employer/employee relationship, the rules regarding vicarious liability will lead the intermediary to be liable for the negligent actions of the performance debtor, irrespective of whether the intermediary itself has acted culpably. A very prominent example of this may turn out to be the Uber platform, where Uber's position is that the private drivers who transport customers throughout the world are self-employed and not employees under Uber's

Uber driver is considered an employee or independent contractor. In this respect, the case of *Jiang Shen Cai t/a French Accent v Michael Anthony Do Rozario*<sup>15</sup> stated that:<sup>16</sup>

In determining whether a worker is an employee or an independent contractor the ultimate question is whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business of his or her own behalf.

Independent contractors may be seen as employees; however, not all independent contractors will fall within the 'employee' definition under the FWA. Hence, when the FWC considers its jurisdictional boundary in terms of unfair dismissals, it is necessary to distinguish between 'contracts of service or employment' and 'contracts for service'. Contracts of service (or employment) refers to employees working for 'someone else's organisation in a subordinate capacity';<sup>17</sup> the latter concept refers to an independent contractor who provides services on his or her own account.<sup>18</sup>

As noted, the distinction between an employee and independent contractor is significant with respect to unfair dismissals because of the interpretation of s 382 of the FWA and the type of protection granted within an employment relationship. Section 382(a) of the FWA provides that:

A person is *protected from unfair dismissal* at a time if, at that time:

- (a) the person is an *employee* who has completed a period of employment with his or her employer of at least the minimum employment period; [emphasis added]

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control. According to Uber, the platform service only connects these self-employed drivers with the customers': at 36.

<sup>15</sup> [2011] FWAFB 8307 (2 December 2011).

<sup>16</sup> Ibid [30]. See further Phillip Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera' (2016) 75 *Cambridge Law Journal* 202-5.

<sup>17</sup> Andrew Stewart, *Stewart's Guide to Employment Law* (The Federation Press, 4<sup>th</sup> ed, 2013) 5.

<sup>18</sup> Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) ch 8. For a further in-depth analysis of the employment relationship, see *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104, 114; *Forstaff Pty Ltd v Chief Commissioner of State Revenue* (2004) 144 IR 1 [90]. It is further noted by E Cordova, 'From Full-time Wage Employment to Atypical Employment: A Major Shift in the Evolution of Labour Relations?' (1986) 125(6) *International Labour Review* 641, 641 that 'It is not so much the appearance and proliferation of new occupational activities that observers find disquieting as the fact that they lie outside the bounds that hitherto had delimited ordinary and even special employment relationships'.

Therefore, in order to receive protection under the FWA from an unfair dismissal, a person *must* be classified as an ‘employee’ under the Act.<sup>19</sup> In determining whether a person is an employee or independent contractor, the FWC, and a court, most commonly applies the multi-factorial test derived from the seminal cases of *Stevens v Brodribb Sawmilling Co Pty Ltd*<sup>20</sup> and *Hollis v Vabu*.<sup>21</sup> The multi-factorial test involves an analysis and application of a range of factors to determine whether the relationship between the contracting parties is one of an employer-employee or principal-independent contractor. Specifically, Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ highlighted that when determining the nature of the employment relationship, one should take into account ‘the totality of the relationship between the parties’ and as a result adopt a multi-factorial approach.<sup>22</sup> In *Abdalla v Viewdaze Pty Ltd t/as Malta Travel*<sup>23</sup> the AIRC applied the *Brodribb* and *Hollis* multi-factorial test but expanded the test to include a much broader range of indicia for current and future cases to take into consideration. Vice President Lawler helpfully summarised the key indicia to be considered as follows:<sup>24</sup>

- i. Exercise of control over work performed;
- ii. Work performed by worker for others;
- iii. Advertising of his or her services;
- iv. Maintenance of own tools or equipment;
- v. Delegation of worker;
- vi. Deduction of income tax from paid worker;
- vii. Remuneration paid by periodic wage or by reference to completion of tasks;
- viii. Worker provided leave entitlements;
- ix. Creation of goodwill in the course of his or her work; and

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<sup>19</sup> *Fair Work Act 2009* (Cth) s 380 for a definition of employee.

<sup>20</sup> (1986) 160 CLR 16.

<sup>21</sup> (2001) 207 CLR 21.

<sup>22</sup> *Ibid* [24]. See specifically Jonathan Burnett, ‘Avoiding Difficult Questions: Vicarious Liability and Independent Contractors in *Sweeney v Boylan Nominees*’ (2007) 29(1) *Sydney Law Review* 163-74.

<sup>23</sup> (2003) 122 IR 215. See further *Scott v Davis* (2000) 204 CLR 333 [34]-[72]; *Leighton Contractors Pty Ltd v Fox*; *Calliden Insurance Limited v Fox* [2009] HCA 35.

<sup>24</sup> *Ibid* [34].

- x. The portion of remuneration spent on business expenses.

This list of factors is not a closed list. The Fair Work Ombudsman ('FWO'), for example, has provided further indicia such as expectation of hours of work and superannuation payments.<sup>25</sup> In the *Rajab* case Commissioner Bissett noted that the 'traditional tests used in determining if an employee is a contractor or employee' were considered as 'articulated in *Jiang Shen Cai t/a French Accent v Michael Anthony Do Rozario*,'<sup>26</sup> which is based on High Court authority.

### III RAJAB SULIMAN V RASIER PACIFIC PTY LTD – EMPLOYEE OR INDEPENDENT CONTRACTOR?

#### *A Facts of Case and Issue in Dispute*

Mr Rajab Suliman, acting on his own behalf, provided evidence that he had been working for Uber since August 2017.<sup>27</sup> Uber, also known as Rasier Pacific Pty Ltd, is a technology platform used to book a transportation ride and also for drivers to provide transport.<sup>28</sup> It was highlighted by Commissioner Bissett, quoting Deputy President Gostencnik, that 'Uber operates across two smartphone applications. One application is for people who require transportation services known as the "Rider App" and the other application is for drivers...known as the "Partner App"'.<sup>29</sup> Once the driver is screened and accepted by Uber, he or she will use the 'Partner App' ('App') in order to provide transportation services. As part of the screening process, Uber will consider the applicant's general driving history as well as criminal checks, and whether the motor vehicle meets the minimum requirements to provide transportation services.<sup>30</sup> Once all checks are complete, the driver must then accept the terms and conditions set out in the Services Agreement contained within the App.<sup>31</sup>

As part of the process of joining Uber, Mr Suliman hired a car through a car hire business that was advertised on the 'Uber Marketplace' website. An initial discussion between Mr Suliman and Uber was held in relation to hiring a vehicle.<sup>32</sup> In hiring the car, Mr Suliman provided the

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<sup>25</sup> Fair Work Ombudsman, 'Independent Contractors and Employees', (Web Page, August 2018) <<https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/rights-and-obligations/independent-contractors-and-employees>>. See, for example, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346.

<sup>26</sup> *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 (12 July 2019) [40].

<sup>27</sup> *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 (12 July 2019) [18].

<sup>28</sup> *Ibid* [5].

<sup>29</sup> *Ibid* [8] quoting *Kaseris v Rasier Pacific VOF* [2017] FWC 6610 (21 December 2017).

<sup>30</sup> *Ibid* [9].

<sup>31</sup> *Ibid* [10].

<sup>32</sup> *Ibid* [20].

required licence and paperwork with insurance to Uber. The App is designed to give the driver freedom to choose how and when to work. Therefore, Mr Suliman could log on and off the App at his own discretion with the freedom to utilise other software applications and/or provide other kinds of services.<sup>33</sup>

The issue in dispute came about when Uber logged Mr Suliman out of his App and removed him from the App in February 2019 without providing any reasons to Mr Suliman.<sup>34</sup> Without access to this App, Mr Suliman could not perform his transport duties in accordance with the App as required under the Services Agreement.<sup>35</sup> Mr Suliman considered this to be an unfair dismissal by Uber. As a result, Mr Suliman brought an application pursuant to s 394 of the FWA seeking relief from unfair dismissal whilst an employee of Uber.<sup>36</sup> Commissioner Bissett therefore had to determine whether Mr Suliman was an employee of Uber or an independent contractor in light of the Services Agreement.

### *B Services Agreement between Mr Suliman and Uber*

The Services Agreement is one that is formed between the driver and Uber. In this respect, it is the agreement accepted by a driver in order to perform transportation services to riders as set out by the terms and conditions. The terms and conditions outlined within the Services Agreement provide a variety of clauses stipulating for example the vehicle requirements, fares, proprietary rights and insurance, amongst other things.<sup>37</sup> The Services Agreement is drafted in a way that Uber may change its terms and conditions in relation to ‘Service Fee Addendums’ at any stage. Once such a term or condition is changed, Uber communicates this to the driver through the Partner App which the driver must accept in order to proceed with a rider request. Commissioner Bissett therefore comprehensively examined the Services Agreement in relation to the employment relationship between Uber and Mr Suliman as well as ‘termination’ of the Services Agreement by Uber or the driver.<sup>38</sup>

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<sup>33</sup> Ibid [21]-[24].

<sup>34</sup> Ibid [1]. See in this regard Marilyn Pittard, ‘Independent Contractor versus Employee: A Question of Legal Approach’ (2015) 21(5) *Employment Law Bulletin* 62.

<sup>35</sup> Ibid [30].

<sup>36</sup> Ibid. *Fair Work Act 2009* (Cth) s 394(1) states that ‘[a] person who has been dismissed may apply to the FWC for an order under Division 4 granting a remedy’.

<sup>37</sup> Ibid [11].

<sup>38</sup> Ibid [11]-[12], [16].

In particular, clause 4 of the 2017 Services Agreement provided a description of the type of relationship between Uber and Mr Suliman. It stated:<sup>39</sup>

You acknowledge and agree that Rasier Pacific's provision of the Uber Services creates a legal and direct business relationship between Rasier Pacific and you. You also acknowledge and agree that Uber's licence to you of the Driver App creates a legal and direct business relationship between Uber and you. Neither Rasier Pacific nor Uber shall be deemed to direct or control you generally or in your performance under this Agreement, including in connection with your provision of Transportation Services, your acts or omissions, or your operation and maintenance of your vehicle. Except as expressly set out herein, you retain the sole right to determine when and for how long you will utilise the Driver App or the Uber Services. You alone decide when, where and for how long you want to use the Driver App, and when to try to accept, decline or ignore a User request. A User request can be cancelled, subject to Uber's then-current policies (including the Community Guidelines located at [www.uber.com/legal/community-guidelines/rides/anz-en/](http://www.uber.com/legal/community-guidelines/rides/anz-en/)). You acknowledge and agree that you will not: (a) display Rasier Pacific's, Uber's or any of their affiliates' names, logos or colors on any vehicle(s); or (b) wear a uniform or any other clothing displaying Rasier Pacific's, Uber's or any of their affiliates' names, logos or colors, unless you and Rasier Pacific or Uber (as applicable) have agreed otherwise or if so required by law. You retain the complete right to engage in other business or income generating activities, and to use other ridesharing networks and apps in addition to the Uber Services and the Driver App.

This clause forms the basis of the case note's discussion with respect to whether it was clearly stipulated that Mr Suliman was an independent contractor rather than an employee.

### *C The Submissions*

In line with clause 4 of the Services Agreement, it was not disputed by Mr Suliman that he provided transport services; however, it was submitted that the FWC should take into account 'whether the worker is the servant of another in that other's business'. Mr Suliman argued that his employment status was that of a casual worker and therefore fell within the ambit of the FWA provisions.<sup>40</sup> Mr Suliman accepted that a casual employee does not fit within the 'work-wages bargain' concept (a requirement that an employee performs work when demanded such as a permanent employee) because a casual employee determines his or her own working hours.<sup>41</sup> However, Mr Suliman submitted that the Uber-driver relationship has similar characteristics to a relationship between an employer and casual employee, because 'the Driver performs work as a servant of Uber with control exerted over the employee through the Partner App [even though] there is no requirement to be available at all times'. Thus Mr Suliman's

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<sup>39</sup> Ibid [11].

<sup>40</sup> Ibid [34]-[35].

<sup>41</sup> Ibid [35]-[36] referring to *Kaseris v Rasier Pacific VOF* [2017] FWC 6610 (21 December 2017).

relationship with Uber was one of employer-employee relationship rather than that of an independent contractor.<sup>42</sup>

In contrast to Mr Suliman's submission relating to the 'work-wages bargain' argument, Uber submitted that the lack of a 'work-wages bargain' coupled with clause 4 in the Services Agreement clearly stipulate that the indicia as applied in *Kaseris v Rasier Pacific VOF*<sup>43</sup> and *Pallage v Rasier Pacific Pty Ltd*<sup>44</sup> should be followed. In both cases it was held that the Uber drivers were not unfairly dismissed because they were independent contractors and not employees. Uber argued that Mr Suliman performed work under no certain and/or fixed obligations, describing Mr Suliman as an independent contractor.<sup>45</sup> Uber further argued that it is clearly stipulated in the Services Agreement that Mr Suliman was not an employee, which supports an independent contractor relationship.

#### *D Decision and Considerations*

Commissioner Bissett dismissed Mr Suliman's submissions in respect of an unfair dismissal claim on a number of grounds. As mentioned earlier, in order to be successful in an unfair dismissal claim under s 394 of the FWA, the person bringing the application must be characterised as an employee under the FWA, as stipulated under s 382 of the FWA.<sup>46</sup>

Firstly, Commissioner Bissett dismissed the submission that Mr Suliman's employment was akin to a casual worker under this arrangement. The mere fact that Mr Suliman does not have control over the inner workings of the App, does not necessarily indicate that he is a casual employee.<sup>47</sup> Although casual employees do have the right to determine their own availability, it is not the only factor to be taken into account under the multi-factorial test. Although Commissioner Bissett did agree that a casual worker, or in this case an Uber driver is flexible with work arrangements, he stated that 'having attended work the casual employee can be

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<sup>42</sup> Ibid. Refer to (n 44) below.

<sup>43</sup> [2017] FWC 6610 (21 December 2017).

<sup>44</sup> [2018] FWC 2579 (11 May 2018).

<sup>45</sup> Ibid [30]-[31].

<sup>46</sup> See (n 1) for the definition of an employee.

<sup>47</sup> According to Moore J in *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420, 425, the court highlighted that 'a characteristic of engagement on a casual basis is...that the employee can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagements that gives it the characteristics of being casual'. See also *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321.

compelled to work for the period present in exchange for wages paid'.<sup>48</sup> This is true in respect of choosing when to log into the App and vice versa. Therefore, Commissioner Bissett agreed with Uber that there was a lack of 'work-wages bargain' when taking into account the Services Agreement in relation to unfair dismissals. Commissioner Bissett concluded that 'there are essential elements of the work-wages bargain that are not apparent in [Mr Suliman's] relationship with Uber, even if the comparison is undertaken with a casual employee'.<sup>49</sup>

Secondly, Commissioner Bissett considered the common law indicia through the application of a multi-factorial approach to further determine the employment relationship and highlighting the differences between employees and independent contractors. The specific indicia applied by the Commission in this case are similar to those mentioned under the tests applied in *Abdalla*. The indicia below are limited to the most relevant considerations in this case.

#### 1 'Control' factor

Mr Suliman submitted that although he 'was in control of his car...Uber was in control of everything else'.<sup>50</sup> It was however held that Mr Suliman had complete control over the service he provided to passengers because he could freely log on and off the App. Although it was argued by Mr Suliman that the App removed his control over certain functions and that he could not make any independent decisions when it came to profitability of a trip, it was noted by Commissioner Bissett that 'this should be balanced against the control Mr Suliman had as to when, where and for how long he worked and whether he would accept a request or not when he was logged off'.<sup>51</sup> Therefore, the Commission pointed out that it was satisfied that Uber did not 'strip' away all autonomy from Mr Suliman and these were not overwhelmingly strong factors.<sup>52</sup> Coupled with this was the fact the Mr Suliman could work for others and that there was 'no requirement on Mr Suliman to work exclusively for Uber'.<sup>53</sup> As in other cases, the element of control was a defining factor.

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<sup>48</sup> *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 [37].

<sup>49</sup> *Ibid* [78].

<sup>50</sup> *Ibid* [23].

<sup>51</sup> *Ibid* [47].

<sup>52</sup> *Ibid* [48].

<sup>53</sup> *Ibid* [51].

## 2 Tools and Equipment

As highlighted in the Services Agreement, Uber did not provide any tools or equipment to drivers and they are responsible for providing their own vehicle, maintenance and insurance. This was a valid consideration for the FWC in terms of the relationship between Uber and its drivers. In *Brodribb*, it was held by Mason J that the applicants provided their own equipment and tools clearly suggesting a contract *for* service rather than a contract *of* service.<sup>54</sup> Based on these indicia and principles, although Commissioner Bissett agreed that Mr Suliman leased his vehicle through a company found on the ‘Uber Marketplace’, it was held that ‘the Uber Marketplace was a service Uber provided which was no more than a convenient co-listing of various car leasing/rental companies’.<sup>55</sup> Therefore, the submissions made by Mr Suliman were dismissed and the Commissioner agreed with Uber that ‘the standard of vehicle required does not mean it provided tools of trade’.<sup>56</sup>

## 3 Wages

On the issue of wages, it is generally accepted at law that ‘employees tend to be paid a periodic wage or salary [and] independent contractors tend to be paid by reference to completion of tasks’.<sup>57</sup> In this respect, Commissioner Bissett held that Mr Suliman was not paid a periodic wage and that evidence suggests he was paid for every task he completed.<sup>58</sup> Furthermore, Mr Suliman was responsible for paying his own taxes and superannuation which, consistent with *Brodribb* and *Abdalla*, weighs heavily against the fact that Mr Suliman was an employee. It is suggested that Mr Suliman understood, from the terms outlined in the Services Agreement that he was working on his own account as an independent contractor.

Ultimately, the Commission held that Mr Suliman’s circumstances were not indicative of an employment relationship under the relevant indicia. Accordingly, Mr Suliman was not afforded the same unfair dismissal protection under s 382(a) of the FWA because he was not an ‘employee’.

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<sup>54</sup> *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 13; [1986] HCA 1 [10].

<sup>55</sup> *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 [57].

<sup>56</sup> *Ibid* [60].

<sup>57</sup> *Jiang Shen Cai t/a French Accent v Michael Anthony Do Rozario* [2011] FWAFB 8307 [30] (‘own emphasis added’).

<sup>58</sup> *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 [67]. In relation to taxes, see Rebecca Millar, ‘UberX Drivers Supply Taxi Travel and So Must Be Registered for GST: Uber B.V. v Commissioner of Taxation [2017] FCA 110’ (2017) 6(1) *World Journal of VAT/GST Law* 47-54.

#### IV OBSERVATIONS

In light of the Services Agreement and the application of indicia, Mr Suliman was held to be an independent contractor. As in the cases of *Kaseris* and *Pallage*, the *Rajab* case further illustrates the difficulty gig economy workers face in seeking a remedy for unfair dismissal under the FWA, which is confined to the restricted definition of ‘employee’ and the application of traditional tests for determining the nature of the employment relationship. However, it is possible for workers operating in the gig economy, including Uber drivers, to fall within the definition of an ‘employee’, depending on which way the indicia point, such as in the case of *Klooger v Foodora Australia Pty Ltd*.<sup>59</sup> In this case, the delivery rider employed as an independent contractor was held to be an employee mainly because Foodora exercised significant control over the rider. It was therefore held that the rider was unfairly dismissed under s 382(a) of the FWA.

The current regulatory frameworks considering unfair dismissals coupled with the growth of digital business models like Uber<sup>60</sup> and the changing nature of employment relationships, has nonetheless given rise to questions on how to adjust employment laws in a way that will protect those who are most vulnerable in a rapidly changing labour context that affords fewer protections to workers. In this respect, Watson et al notes that ‘there have been modest gains in flexibility for workers, but not enough to meet the challenges of diversity...the Australian workforce is now fairly evenly divided between those working as permanent employees, and those working on non-standard or a more precarious basis...When it comes to work, the key challenge which the community faces in the twenty-first century is how to develop new standards for new times, that is standards for flexibility’.<sup>61</sup>

Both Federal and State Governments have taken some steps to approach different workplace models such as Uber-driver through multiple submissions and the establishment of a *Select Committee on the Future of Work and Workers* to consider the impact of technology within

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<sup>59</sup> [2018] FWC 6836 (16 November 2018). An international example of where gig economy workers had signed an agreement as independent contractors but were held to be employees is *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150 (22 August 2017). In relation to liability under Tort and Contract in the gig economy, see Agnieszka McPeak, ‘Sharing Tort Liability in the New Sharing Economy’ (2016) 49(1) *Connecticut Law Review* 171-225.

<sup>60</sup> Evans (n 2) 1; Smith and Roy Morgan (n 7).

<sup>61</sup> Ian Watson et al, *Fragmented Futures: New Challenges in Working Life* (Federation Press, 2003) in Carolyn Sappideen et al, *Macken’s Law of Employment* (Lawbook, 7<sup>th</sup> ed, 2011)13.

such workplace models.<sup>62</sup> However, a question that arises is whether there are avenues where existing legislation will be able to protect Uber drivers within the scope of s 382(a) of the FWA. One avenue of protection is to possibly broaden the definition of a ‘worker’ to include Uber drivers as employees and thereby broadening the application of the employment relationship itself under the FWA.

Under the *Work Health and Safety Act 2011* (Cth), for example, it is clear that protection is provided to a person who performs work as an employee, independent contractor, outworker and other related ‘workers’.<sup>63</sup> Therefore, accommodating a definition of ‘worker’ under the FWA, may assist with creating a new category of ‘worker’ that will provide adequate protection to those Uber drivers who are unfairly dismissed due to their status in this type of workplace model.<sup>64</sup>

It is therefore submitted that employment laws need to be reformed in order to capture those persons who do not have the necessary protection under the FWA despite the fact that their employment relationship is more akin to that of an employee than an independent contractor. The evolving nature of employment relationships in a gig economy needs to be considered and, notwithstanding agreements that have been signed as independent contractors, the ‘true nature of the employment’ warrants close examination. As argued by Mr Suliman, the Agreement ‘is not reflective of the true operations of Uber and its relationship with him’.<sup>65</sup> Despite the wording of the agreement what happens in ‘reality’ may be a different experience. As noted by the court in *Prasad v LSG Sky Chefs New Zealand Ltd* ‘[a] labour hire agreement does not represent an impenetrable shield to a claim that the “host” is engaging the worker under a contract of service. Much will depend on the particular facts of the individual case and an

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<sup>62</sup> Senate Select Committee on the Future of Work and Workers, Parliament of Australia, *Future of Work and Workers* (2018) 1.

<sup>63</sup> *Work Health and Safety Act 2011* (Cth) s 7. A similar type definition exists in the United Kingdom under the Employment Rights Act 1996 (UK) s 230(3)(b) stating ‘In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under) -

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker’s contract shall be construed accordingly.’

<sup>64</sup> This will assist employers masking the employment relationship and considering it a sham contract. See also Andrew Stewart and Shae McCrystal, ‘Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?’ (2019) 32 *Australian Journal of Labour Law* 4, 11-2. See further Benjamin Means and Joseph Seiner, ‘Navigating the Uber Economy’ (2016) 49 *Davis University of California* 1511.

<sup>65</sup> *Rajab Suliman v Rasier Pacific Pty Ltd* [2019] FWC 4807 (12 July 2019) [33].

analysis of the *real nature of the relationship, including how it operated in practice*' (emphasis added).<sup>66</sup> This observation applies equally well within the Australian labour context.

Although the decision in *Rajab Suliman v Rasier Pacific Pty Ltd* affirms the prevailing position that Uber drivers are independent contractors and not employees it is submitted that there is a need for clarity in identifying the unique employment relationships through broadening of terminology as recommended above. In the absence of greater legal clarity and certainty, Uber drivers and riders employed in the gig economy may be left vulnerable, open to exploitation and misclassification. As noted by Commissioner Cambridge in *Klooger* '[c]ontracting and contracting out of work, are legitimate practices which are essential components of business and commercial activity in a modern industrialised economy. However, if the machinery that facilitates contracting out also provides considerable potential for the lowering, avoidance, and/or obfuscation of legal rights, responsibilities, or statutory and regulatory standards, as a matter of public interest, these arrangements should be subject to stringent scrutiny'.<sup>67</sup> The need for greater scrutiny and legislative reform to meet the needs of a gig economy is further highlighted by Deputy President Gostenchik in *Kaseris* noting that:

The notion that the work-wages bargain is the minimum mutual obligation necessary for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new "gig" or "sharing" economy. It may be that these notions [tests] are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.<sup>68</sup>

Meanwhile, persons such as Mr Suliman should be aware that the more obligations ride-sharing services such as Uber place on the drivers, the more likely it is that they will be considered employees. However, every unfair dismissal case is considered on an individual basis and therefore it is important for Uber drivers to read the terms and conditions set out in the Services Agreement and understand their duties when it clearly stipulates the relationship as one of

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<sup>66</sup> *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC 150 (22 August 2017) [98].

<sup>67</sup> *Joshua Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836 (16 November 2018) [106].

<sup>68</sup> *Kaseris v Rasier Pacific VOF* [2017] FWC 6610 (21 December 2017) [55].

‘service provider’ and ‘independent contractor’.<sup>69</sup> Given the legal consequences that flow from the employment relationship it is prudent for Uber drivers such as Mr Suliman to seek advice on their employment status if they are unsure about the terminology or terms and conditions provided in the Services Agreement. Misclassification of an Uber driver as an ‘independent contractor’ in order to mask any rights available to Uber drivers or the inclusion of unfair contract terms may have significant consequences for Uber.

#### V FINAL REMARKS AND CONCLUSION

While the FWC may consider all of the relevant factors and indicia for unfair dismissal claims within the employment relationship, they are to an extent restricted in interpreting every model such as Uber-driver within the scope of current tests. The decision in *Rajab Suliman v Rasier Pacific Pty Ltd* highlights the potential difficulty the FWC and courts face when weighing up the factors for unfair dismissals within their jurisdictional limitations in relation to employment in the gig economy. The meaning of ‘employee’ extends to more than what is currently interpreted as such under the FWA for unfair dismissal purposes. In *Hollis v Vabu* it was stated that ‘[t]he tokens – "employer", "employee", "principal" and "independent contractor" – which provide the currency in this field of discourse have survived for a very long time and have been adapted to very different social conditions’ and that the ‘nature of employment relationships has changed greatly since the age of feudal status,’<sup>70</sup> so too is it submitted that these terms should be adapting to the changing nature of the current labour context to accommodate technological changes affecting the employment relationship given that current legal terms and tests predate the gig economy.

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<sup>69</sup> For an in-depth discussion on the global impact of regulation relating to independent contractors and the gig economy, see Keith Cunningham-Parmeter, ‘From Amazon to Uber: Defining Employment in the Modern Economy’ (2016) 96 *Boston University Law Review* 1673. See, e.g, Yasaman Maozami, ‘UBER in the U.S. and Canada: Is the Gig-Economy Exploiting or Exploring Labor and Employment Laws by Going beyond the Dicotomous Workers’ Classification’ (2017) 24(2) *University of Miami International and Comparative Law Review* 609-60.

<sup>70</sup> *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 [34] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).