



# Ontario Labour Relations Board issues first decision regarding workers in the “gig economy” - food-app couriers permitted to unionize

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In *Canadian Union of Postal Workers v. Foodora Inc. d.b.a. Foodora* (February, 2020) the Ontario Labour Relations Board (“OLRB”) found that couriers working for Foodora, an online food delivery company, were dependent contractors and therefore “employees” under the *Labour Relations Act, 1995* (“Act”). This ground-breaking decision is expected to have far-reaching implications in the modern “gig-economy”.

The case arose as a result of an application for certification by the Canadian Union of Postal Workers (“CUPW”) to be the exclusive bargaining agent for the couriers working for Foodora. According to CUPW, the couriers were dependent contractors falling within the definition of “employee” under the Act. Foodora resisted the certification arguing that the couriers were not employees and instead were independent contractors without the right to bargain collectively.

In its decision, the Board discussed the concept of “dependent contractor” at some length. The Board noted that the category of dependent contractor was first proposed by Professor Harry Arthurs fifty-five years ago. He contemplated a classification of worker that would fall between employee and independent contractor. Professor Arthurs argued that dependent contractors should have the right to bargain collectively. In 1975, Ontario adopted the concept and amended the Act to stipulate that an “employee” includes a dependent contractor. The Act defines “dependent contractor” as follows:

*dependent contractor* means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

In applying this definition to the facts, the Board noted that the essential question in all such cases is



whether the workers in question more closely resemble employees or independent contractors. The Board embarked on this determination by applying the following factors set out in *Algonquin Tavern* (1981), the seminal case on dependent contractor status:

- **the use of, or right to use substitutes** – the individual’s ability to use someone else’s skill or labour to complete the work indicates independent contractor status;
- **ownership of instrumentalities, tools, equipment, appliances, or the supply of materials** – while not the most significant factor, ownership of equipment and tools and supply of materials indicates independent contractor status;
- **evidence of entrepreneurial activity** – the chance of loss or profit by virtue of the individual’s entrepreneurial acumen indicates independent contractor status;
- **the selling of one’s services to the market generally** – the fewer the purchasers of the individual’s services, or where the individual is limited in the ability to provide services to other purchasers, indicates dependent contractor status;
- **economic mobility or independence, including the freedom to reject job opportunities, or work when and where one wishes** – this flows from the terms and conditions of the relationship and where present will indicate independent contractor status;
- **evidence of variation in the fees charged for the services** – the ability to negotiate or alter fees indicates independent contractor status;
- **the extent, if any, of integration** – the more frequently the individual is re-engaged by the organization, or the longer the duration of the relationship, the more likely the individual will be seen to be integrated indicating dependent contractor status;
- **the degree of specialization, skill, expertise or creativity involved** – a high degree of special skill or creativity indicates independent contractor status;
- **control of the manner and means of performing the work** – the individual’s ability to control how the work is performed indicates independent contractor status;
- **the magnitude of the contract amount, terms and manner of payment** – if the individual is paid in a similar manner to that of an employee, dependent contractor status is indicated;
- **whether the individual renders services or works under conditions which are similar to persons who are clearly employees** – working conditions that are similar to those of employees indicate dependent contractor status.

In applying the applicable factors to the evidence, the Board found that the couriers were in fact dependent contractors. The couriers were not able to use substitutes and there was little opportunity for entrepreneurial activity. While the couriers did own the delivery bags and vehicles (cars or bikes) used to deliver the food, the Board found that the most important tool in the operation was Foodora’s App. This was described as the “lynchpin in the process” and was used by both customers and restaurants, and it created the algorithm used to assign a delivery to a courier.



Foodora was also found to have control over the structure and availability of shifts, and the geographical zones to which couriers were assigned. In addition, the couriers were found to have no ability to negotiate the terms and conditions of their engagement, or to negotiate their compensation. The Board summarized its findings as follows:

The couriers are selected by Foodora and required to deliver food on terms and conditions determined by Foodora in accordance with Foodora's standards. In a very real sense, the couriers work for Foodora, and not themselves.

### **In our view**

Although this is not the first case in which the Board considered the status of couriers, it has received considerable attention as the first case involving what the parties and media describe as the new "gig economy". This attention is likely justified. Online marketplace platforms and ever-improving technologies continue to connect organizations and individuals in new and unforeseen ways. The result can be non-standard working relationships that are difficult to place on the traditional spectrum. This decision will undoubtedly play a part in how these relationships are examined and classified.

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