

# Ontario Labour Relations Board rules that Foodora couriers can unionise

04 March 2020 | Contributed by [Fasken](#)

## Facts

## Decision

## Key takeaways for employers

In its first gig economy decision, the Ontario Labour Relations Board has decided that Foodora's food delivery couriers are dependent contractors and can unionise.<sup>(1)</sup>

### Facts

Foodora is a web services company. Through its app, the company provides an online marketplace connecting customers and restaurants. Customers order food from restaurants using the app, and Foodora dispatches couriers to the restaurant to pick up and deliver the food to the customers. Traditionally, Foodora treated most couriers as independent contractors who accessed delivery opportunities through the app.

The Canadian Union of Postal Workers (CUPW) conducted a union organising campaign of couriers. The union applied to the board for certification as the exclusive bargaining agent for Foodora couriers working in Toronto and Mississauga. On 9 August 2019 the board conducted an electronic vote and the ballot box was sealed and not counted because of legal issues in dispute.

The primary issue at this stage in the proceeding was whether the couriers are dependent or independent contractors. This was important because if the couriers are independent contractors, the application would be dismissed. If they are dependent contractors, the application could proceed.

### Decision

The essential question for the board was whether the courier relationship with Foodora more closely resembled the relationship of an employee or that of an independent contractor.<sup>(2)</sup> To answer this question, the board examined a series of well-established factors and evidence submitted by parties.

#### ***Use of or right to use substitutes to complete work***

The evidence on this factor suggested that Foodora couriers are more like employees because they could not substitute another to do their work.

#### ***Ownership of instruments, tools, equipment or materials***

Some equipment (eg. bikes, helmets and delivery bags) is provided by Foodora couriers, but the key piece of equipment for work – that is, the app allowing access to delivery opportunities – is the sole property of Foodora. The board said that this more closely resembled an employee permitted to use company software than an independent contractor.

#### ***Evidence of entrepreneurial activity***

There was no opportunity for Foodora couriers to increase their compensation through anything other than their own labour and skill (ie, by making more deliveries). The board said that this more closely resembled an employment relationship.

#### ***Individuals selling their services to the market generally***

Foodora couriers could not sell their services directly to the customer or restaurant. This suggested that Foodora couriers are more like employees.

#### ***Economic mobility or independence***

This factor suggested that Foodora couriers are dependent contractors because there is a complex system of incentives and restrictions similar to employment relationships with on-call employees.

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**Variation of fees charged for services rendered**

This factor suggested that Foodora couriers are dependent contractors because they could not vary their fees.

**Extent of integration**

The board stated that this factor suggested that Foodora couriers are dependent contractors because they are heavily integrated into the business. In fact, the company's entire revenue depended on its couriers and the couriers, in turn, depended on the app.

**Degree of specialisation, skills, expertise or creativity**

This factor was neutral because there is no specialisation.

**Control of manner and means of performing work**

This factor suggested that Foodora couriers are dependent contractors because there are numerous controls by Foodora on the manner and means of performing the work, similar to those in an employment relationship.

**Magnitude of contract amount, terms and manner of payment**

This factor was neutral because there is no comparative evidence of contract amount and, although Foodora couriers are paid by direct deposit on a weekly basis, this might also exist for independent contractors.

**Whether couriers render services or work under conditions which are similar to persons who are clearly employees**

This factor was not considered in detail because it was covered by other factors.

After a careful review of the evidence, the board decided that Foodora couriers are dependent contractors and, as a result, they can unionise.

Foodora couriers are not yet unionised. CUPW's application for certification has survived only this first challenge. It will proceed to the next stage to resolve disputes on the eligible vote list. Once those issues have been determined, the board will unseal the ballot box. Foodora couriers will be unionised only if the majority of votes by eligible voters are in favour of the union.

**Key takeaways for employers**

This is the first Ontario decision on the status of gig economy workers. However, these determinations are extremely fact specific. A finding that Foodora couriers are dependent contractors and able to unionise does not mean that all gig economy workers are dependent contractors. With advance planning, careful design and management, it is possible for organisations to set up gig economy relationships that will be found to be independent contractor relationships.

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**Endnotes**

(1) *Canadian Union of Postal Workers v Foodora Inc (dba Foodora)* (2020), OLRB 1346-19-R.

(2) *Foodora*, Paragraph 80.

Maria-Cristina Cavicchia, articling student, assisted in the preparation of this article.

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