

A VISION IN THE WORKPLACE

Our June edition of Vision includes:

- A look at a recent workplace death case and its groundbreaking sentencing.
- A FWC case has determined a Deliveroo driver to be an employee - what does this mean for the classification of workers?



First Time a Company Director has Been Gaoled over Workplace Death

A company director has received a 2 year and 2 month gaol sentence for the death of a worker while at work in Western Australia. It is a record prison term in that the director will be the first person to serve gaol time under workplace health and safety laws in Australia.

In 2020, Jake Williams, a worker for MT Sheds (WA) Pty Limited ("the Company"), was installing roof sheets on a large machinery shed with another worker, Fraser Pinchin, when a strong wind caused him and his co-worker to fall from heights of up to 9 metres. While Mr

Pinchin suffered multiple fractures to his pelvis, hip, wrist and ribs, Mr Williams lost his life in what could have been a completely avoidable accident, had proper control measures been implemented to ensure the safety of the two workers while onsite.

The Company and its director, Mr Mark Thomas Withers, pleaded guilty to seven separate charges, which included charges in relation to the death of Mr Williams, the serious injuries to Mr Pinchin, and gross negligence against the Company, for which it received a \$550,000 fine and a further \$55,000 for breaches of the Occupational Safety and Health Regulations.

The prison sentence for Mr Withers was in relation to a charge that the Company's gross negligence occurred with his consent or was attributable to his neglect as director of the Company. Mr Withers admitted this offence. He will serve the first 8 months of the prison sentence immediately, with the remaining 18 months to be served as a suspended sentence.

Other charges included that neither the director nor the workers held 'high risk' work licenses and that the Company, under Mr Withers' direction, enabled Mr Williams to do construction work despite not holding the requisite construction induction training certificate.

"Withers completely failed in every sense to provide a safe workplace for his employees, and as a consequence, a young man lost his life and a family lost a loved one," WorkSafe WA commissioner Darren Kavanagh said.

It is the first time in Australian history that a person has been handed an actual prison sentence under occupational health and safety laws for the death of a

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worker. Following the tragic circumstances leading to the sentence, Mr Kavanagh hopes the Western Australia's first gaol sentence for a worker's death will act as a 'deterrent' and strongly encourage employers to review and revise their workplace health and safety policies, practices, and procedures to ensure the safety and wellbeing of workers, especially in high-risk occupations.

Stevens & Associates Lawyers provides expert advice in work health and safety litigation, including defending prosecutions. If you require assistance in reviewing your workplace health and safety policies and procedures, or responding to a notifiable incident, please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#), and [Daphne Klianis](#).



Delivery Giant Loses Landmark Case

In a recent case before the Fair Work Commission a Deliveroo rider ("**Mr Franco**") has been deemed to be an employee and not an independent contractor, and therefore a person protected from unfair dismissal. This

case is a major breakthrough for the Transport Workers Union's continuing bid to establish that gig workers are employees within Australia.

Background

Mr Franco initially began work as a food delivery driver for Deliveroo, an online food delivery company, on 22 April 2017 as an independent contractor under a "supplier agreement". On 23 April 2020, Deliveroo advised Mr Franco by email that he had breached his supplier agreement due to his alleged "*slow deliveries*" and was subject to 7 days' notice of termination of his contract. Mr Franco ceased providing services for Deliveroo on 30 April 2020. Mr Franco subsequently lodged an application to the Fair Work Commission alleging that he had been unfairly dismissed by Deliveroo. He sought reinstatement, continuity of service and backpay as remedy for his alleged unfair dismissal. Deliveroo lodged a jurisdictional objection to his unfair dismissal application on the basis he was an independent contractor, not an employee, and was not dismissed.

Judgment

1. Contract Arrangements

The Commissioner identified that the supplier contract, "*clearly attempt[s] to establish a relationship of principal and independent contractor*", as it directly stipulates that the supplier is not an employee, and that the relationship is one of principal and independent contractor. The Commissioner held that the agreements' written terms "*are an important factor in any determination of the correct characterisation*" of the relationship. However,

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he found that *"Deliveroo, determined the terms unilaterally"*, and that the evidence *"clearly established"* the rider had *"no capacity to negotiate any of the terms of the supply/supplier agreements"*.

2. Unconscionable Termination

Commissioner Cambridge held that it was unconscionable for Deliveroo to terminate Mr Franco without first hearing from him. Turning to the validity of the rider's dismissal, for which Deliveroo notified Mr Franco by email with a week's notice for breaching his supplier agreement by failing to deliver orders in a reasonable time, Commissioner Cambridge said Deliveroo never told Mr Franco what delivery times it expected. Therefore, failure to deliver within a reasonable timeframe *"could not represent a reason that was sound, defensible or well-founded"* and there was consequently *"not a valid reason for the dismissal of Mr Franco related to his capacity or conduct"*. Commissioner Cambridge said the *"procedure that Deliveroo adopted whereby it advised Mr Franco of the termination of his services by way of email communication and without any proper, prior warning, was unjust, unreasonable, and unnecessarily harsh"*. Commissioner Cambridge ordered Deliveroo to reinstate Franco by 8 June 2021, with continuity of employment and restoration of lost pay.

3. Complete picture is that of employee and employer according to Commissioner Cambridge

The Commissioner took into account the following in his decision:

- The rider was permitted to and did work for Deliveroo's competitors, as permitted by its service terms.
- The significant level of control Deliveroo possessed strongly supported the existence of employment.
- Mr Franco was required to present as a Deliveroo employee by wearing their branded clothing and equipment displaying their logo.
- Mr Franco was paid an amount per delivery.
- The program directed Mr Franco to undertake work at particular times and regularly make himself available for work.
- Although Deliveroo permitted Franco to delegate or subcontract, Commissioner Cambridge said there were *"clear financial constraints"* upon it as his remuneration *"would be unlikely to cover payment of the national minimum wage to any delegate"*.
- He noted also that Deliveroo provided branded equipment but paid per delivery by generating a templated invoice and did not deduct tax or pay leave entitlements.

What does this mean for you?

This decision means that employees may be currently misclassified as independent contractors under supplier agreements (or similar instruments). Although the terms of a supplier agreement may go to significant lengths to establish a relationship of principal and independent contractor, there are other factors that must be considered to determine the true nature of the relationship between parties. In this case, the FWC determined that despite being labelled as an

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independent contractor under the agreement Mr Franco was in fact an employee.

This case clearly demonstrates that even contracts which expressly provide for independent contractor and principal, and that the relationship is not that of employment, may be vulnerable to misclassification of employment.

If you have any questions relating to employment classification, please do not hesitate to contact [Nick Stevens](#), [Luke Maroney](#), or [Daphne Klianis](#).

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