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AUSTRALIAN LABOUR & EMPLOYMENT RELATIONS ASSOCIATION SA

MAY 2021 NEWSLETTER

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Note: The views of the contributors are not necessarily those of ALERA SA

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Mr Greg Stevens

PRESIDENT'S MESSAGE

Dear Members

Welcome to the era of the illusion of agency. The gig economy is based on a contrived principle of autonomous contractors plying their own trade or business. This thankfully is being incrementally recognised as a sham. Workers' personal autonomy is being brought to attention as the social contract and personal bodily autonomy clash in the area of compulsory vaccinations (admittedly only to maintain one's livelihood).

Even the access to secure ongoing employment has been undermined by being able to be defined by employer fiat (for at least 12 months) rather than the features of "true" casual work. Subsidiarity – the system of leaving unimportant decisions to the lower levels whilst retaining power over important decisions at higher levels – is currently playing out in IR & HR circles.

As I watch the pendulum swing back and forth I am reminded of the scene in Life of Brian where Brian tells the adulating crowd "You are all individuals" to a softly spoken individual replying "I'm not". Are we all individuals? … or not?

Glen

Glen Seidel, President – ALERA SA

Mandatory flu vaccination policy: a cautionary tale

By Kylie Dunn and Jacqui Ballard, DMAW Lawyers

In the recent decision of *Barber v Goodstart Early Learning* [2021] FWC 2156 (**Barber case**), the Deputy President of the Fair Work Commission upheld a decision to dismiss an employee for refusing to comply with a direction given to her by her employer to receive an influenza vaccination.

The Barber case has generated ample discussion in the context of the rollout of the COVID-19 vaccination across Australia. But the outcome should be treated with caution and employers should bear in mind the specific circumstances of that case.

Background

Ms Barber was employed by Goodstart Early Learning (**Goodstart**) as a Lead Educator. Goodstart is a not-for-profit organisation providing early learning and childcare services throughout Australia.

In April 2020, Goodstart introduced a mandatory direction that all staff be vaccinated against the influenza virus, unless they had a medical condition which would make it unsafe for them to do so.

Ms Barber objected to Goodstart's direction on the basis that she has a sensitive immune system. Over a period of four months, Ms Barber was afforded the opportunity to present evidence to Goodstart to support her objection to the vaccination.

Goodstart considered that the ambiguous medical certificates she presented did not substantiate her alleged reason for refusing to be vaccinated and proceeded to terminate her employment.

Ms Barber challenged her dismissal by bringing an application in the Fair Work Commission alleging that the dismissal was harsh, unjust or unreasonable within the meaning of section 385 of the *Fair Work Act 2009* (Cth).

Outcome

In determining Ms Barber's application, the Deputy President considered, amongst other matters, whether there was a valid reason for her dismissal.

The Deputy President had regard to the following matters in concluding that the mandatory vaccination policy was a lawful and reasonable direction:

- vaccination is accepted as a superior control measure to control/prevent the spread of viruses;
- it would be hugely burdensome on Goodstart to implement other control measures that would be as effective as vaccination; and
- the childcare environment is a particularly unique environment. Children and educators are required to be in close contact with one another numerous times a day, children have weaker immune systems than adults and are therefore more vulnerable to influenza, and other measures to reduce infection risks such as social distancing are not practical in that environment.

Having regard to the inadequacy of the medical evidence presented by Ms Barber in support of her objection to being vaccinated, the Deputy President concluded that Goodstart had a valid reason to terminate her employment by virtue of her failure to comply with the mandatory direction and dismissed the application.

The Deputy President rejected Goodstart's position that by virtue of not being vaccinated Ms Barber lacked capacity to perform the inherent requirements of her role.

Lessons for employers

The decision should not be relied upon by employers as a green light to introduce mandatory vaccination policies with respect to COVID-19 or vaccinations more generally. The Deputy President expressly noted in his judgment that the decision relates specifically to the influenza vaccine in a highly particular industry where the risks and concerns are distinct.

The Barber case does not change the position for most employers who may be considering issuing a direction to employees requiring them to be vaccinated against COVID-19. For most employers, such a direction will not constitute a lawful and reasonable direction and any decision to terminate an employee's employment for refusing to be vaccinated will create significant risk. Equally, employers should exercise caution before assuming that a refusal to comply with a lawful and reasonable vaccination policy will, in and of itself, justify a decision to terminate.

SAVE THE DATE!!

ALERA SA AGM

AGM followed by guest speaker TBA
Refreshments will be available

WHEN: Monday 16 August 2021
4:30 for 5.00

WHERE: Police Club, 27 Carrington St, Adelaide

Non-standard work and the Gig economy

A paper by Ciaran Strachan - Senior Fair Work Specialist at hrsafe.com.au

In this paper, I discuss and examine non-standard work and attempt to answer the following questions:

- What is non-standard work?
- What is its relationship to the gig economy?

And answers to the big Questions like.....

- Is precarious employment/insecure work on the rise?
- Are business models leveraging gig tech to increase profits by underpaying workers?
- Is the gig economy driving an increase in precarious employment?

Some of these answers may shock you as they did me. And even if you disagree with them, at least the evidence shows what we as a nation lack in data, which is important to note before making possibly erroneous conclusions as to what that problem is and how best to fix it.

Enjoy!

Introduction

The Industrial Relations environment nearly had a heart attack in 2009 when the gig economy first became a mainstream issue fueled by technological innovation. Since 2009, we have seen several successful court cases where platform owners have successfully defended challenges from contractors that they were employees. The wider Employment Relations field has expanded into the use of technology as a solution to mitigate other labour law risk including wage-theft, underpayments and unfair dismissal claims.

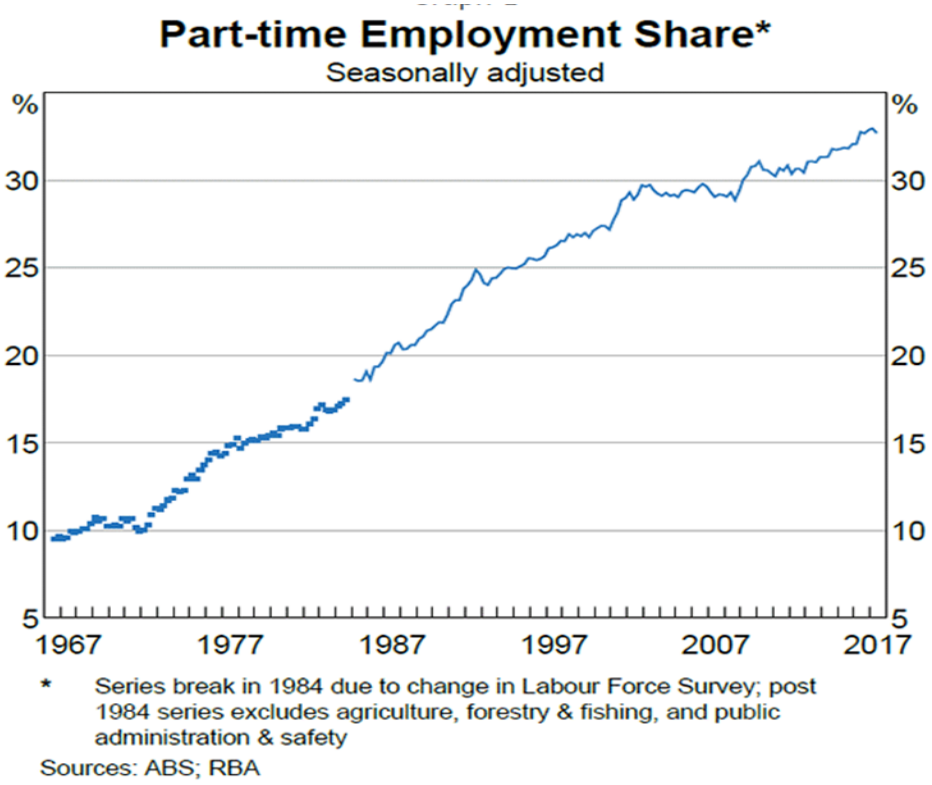
But is technology contributing towards an increase in precarious employment? Is non-standard work on the rise? What even is non-standard work and how do we define it? I'll attempt to answer these questions based on research, and not just my opinion.

What is non-standard work?

Due to structural shifts in the economy, the Australian labour market has undergone change over the past 30 years, which include the emergence of service industries as the driving force of the economy and employment growth (Gilfillan, 2018).

Between 1988 and 1998, the proportion of employees in casual jobs increased from 19% to 27% (ABS, n.d) and part time rates increased from 11% in 1980 to 17% in 2000 (ABS, n.d). During that time, there has been very strong growth in labour participation for women, and in part time and casual employment, with a decline in permanent full-time employee share of total employment (Gilfillan, 2018). Since the early 2000s, non-permanent employment has somewhat stabilised between to 24 and 25% of Australia's current working population (Gilfillan, 2018 December) (Gilifillan, 2018 January).

However, the RBA (Reserve Bank of Australia) highlights an upwards trend of part time employment from 9% in 1967 to 33% in 2017 (Cassidy & Parsons, 2017).



Collectively, non-standard forms of employment include part-time and casual work, in addition to the more recently seen use of contractors with regards to technological work (Lab & Wooden 2019).

In 2018 the ACTU published "The Rise of Insecure Work in Australia" which best summarises just what unsecure work is….."*The terms insecure work, precarious work and non-standard employment have been used interchangeable in much of the academic literature and policy debates. There is legitimate discussion about exactly what these terms cover. But there is near universal agreement among expert labour statisticians, reputable multilateral and tripartite institutions including the OECD and ILO, as well as among an extremely wide range of governments that these terms include several categories of work."*

The report then goes on to discuss and list the following categories of employment as insecure work:

- Casual,
- Independent Contractors, and
- Part-time.

There are instances of employers misusing insecure work in order to reduce labour costs by classifying full time employees as casuals or independent contractors (ACTU, 2018). Employers use multiple short-term contracts to ensure workers cannot accumulate benefits (ACTU, 2018). Labour Hire companies create triangular employment relationships; sacking people in standard employment and rehiring the same workers to do exactly the same job, but calling them contractors; or creating an entire sector of casuals that work 38-hour weeks for several years (on 12-month contracts).

A recent example of this where the employer was found to have breached the *Fair Work Act 2009* (Cth) and National Employment Standards (NES) was *WorkPac Pty Ltd v Skene* **[2018] FCAFC 131** (Skene case) and *WorkPac Pty Ltd v Rossato* **[2020] FCAFC 84** (Rossato case).

When interviewed, Adero Law (representative counsel for both Skene and Rossatto) stated that the Rossato case was a funded action by Workpac against themselves (personal interview, 3 July, 2020). According to Adero Law, Workpac did this to offset the casual loading against a previous determination (Skene case) where another casual employed on a permanent basis was found to be a permanent employee. Adero Law stated that "the total remuneration of the miner in question was roughly 40% less than the equivalent permanent miner working for Rio Tinto, and the 25% casual loading would be used to reduce remuneration owed to 15%." (personal interview, 3 July, 2020).

Both cases were seen as a big win for workers including members of the CFMEU and to "permanent casual" work models (CFMEU, 2020, para 1). In both cases, miners worked 7 on and 7 off rosters, with 12-month contracts, which had been renewed for several years (4 years in total for Rossato). Although the Full Court of the Federal Court of Australia established that the rate paid to Rossato included a casual loading, they disregarded this for the following reasons.

1. The previous case (Skene case) concluded in 2016. Additionally, since 2014, Workpac had known it was underpaying permanent employees as casuals yet continued to do so. Of the 182 payslips paid to Rossato, none showed a casual loading; instead they showed a flat rate.
2. There was no evidence produced by Workpac that its mistake was operative (or in other words, a genuine misclassification/calculation).
3. There was no indication that Rossato would have been resistant to a reclassification from casual to permanent (something which many employer groups and state chambers claim is commonplace for casuals, yet evidence says otherwise, including this case).
4. Workpac determined Rossato's hourly rates, and there is no evidence of negotiation (evidence also supports this is commonplace as casuals are forced to take what they are given, they do not have any power to negotiate).
5. Workpac failed to prove that its mistakes in paying hourly rates that exceed the EBA minimum included a casual loading. In short, they attempted to reverse engineer their payslips to include a casual loading, but failed to support this with evidence, so this didn't work.

According to AI Group, this is casual double dipping. AI Group claim that it is common for casuals to work on a regular and systematic basis for existing periods and that the Skene case may effect the 1.6 million casuals who work on a regular and ongoing basis (AIGroup, 2018, para 1).

However, a 2018 report tabled in parliament titled "Characteristics and use of casual employees in Australia" states the following:

- There are 2.5 million casual employees in Australia.
- From 1982 to 2016, casuals grew from 13% of all employees to 22% of all employees in 1992 and stabilised at 25% from 1996 to 2016. (Gilfillan, 2018, page 1).
- 19% of casuals work for an employer for a period of greater than 12 months.
- 53% of casuals experience fluctuations of work (or irregular working patterns) which in turn effect their earnings.
- The hospitality and food service industries comprise of 79 and 75% casuals.
- Casual employment is generally sought only by those wanting few hours with other primary responsibilities such as parents or students.

Non-standard work and its relationship to the gig economy

Stanford, 2017 best sums up gig workers …. *"Instead of being regular employees, workers will support themselves as flexible, free independent suppliers, moving seamlessly from one job (or "gig") to another, utilising digital technology to connect with the customers who purchase their respective wares or services."*

This description sounds attractive and seemingly legitimate by not falling into the category of precarious work as previously discussed and defined. However, many cases are starting to emerge where these arrangements are becoming a form of precarious work, better known as sham contracting (Fair Work Ombudsman, N.D). Although this argument is not clear cut and as Stanford states, the emphasis here is the drive of obtaining work through technology, also known as digital platform work (Stanford, 2017). This is something which, until relatively recently (2009 onwards), was not even possible. It has only been since the introduction of smart phones, tablets and phone apps, that which business models can be facilitated in a way which could not be previously managed via non internet connected phones and faxes.

Smart phone technology only just pre-dates the implementation of the *Fair Work Act 2009* (Cth) (FW Act). A quick internet search will reveal the history of this boom from thousands of sources. It started with the launch of the apple iPhone in 2007. In 2010, it was followed by the launch of apple tablet 2010 (to bridge a market gap between smart phones and laptops) and first phone app boom. Yet the Fair Work Commission's (FWC) independent contractor test has largely remained the same since 2009. In 2009, contractor procurement was still largely complicated and only able to be facilitated via post or fax. It required several often face to face exchanges between the contract manager and contractor before the final contract was signed by both parties and work commenced. Now a phone app can facilitate this process in less than a minute.

Examples of gig platforms still being considered as passing the FWC independent contractor test include recent unfair dismissal cases by ex Uber Contractors. The contractors submitted that they were employees, yet the FWC dismissed their application as they concluded they were in fact, contractors (*Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats [2020] FWCFB 1698* [Gupta case]).

Moreover, this was also concluded by the Fair Work Ombudsman (FWO) who publicly stated in June 2019*…."The Fair Work Ombudsman has completed its investigation relating to Uber Australia Pty Ltd and its engagement of drivers……The weight of evidence from our investigation establishes that the relationship between Uber Australia and the drivers is not an employment relationship"* (FWO, 2019).

However, gig workers, including Uber Eats delivery drivers are not clear-cut contractors. The FWC in the Gupta case did find that some matters leant in favour of "finding employment". These included: that Ms Gupta's work did not involve the exercise of any specific trade or skill; the delivery fee for Ms Gupta's work was set by Portier Pacific; and she had no means to independently expand her operations.

In July 2020, the first full-scale government inquiry to platform work in Australia, possibly even globally was released (Forsyth 2020). This enquiry picked up several gaps within our current employment legislative environment, which include:

- Platforms exercise significant levels of discretion and control over gig work and how it is organised.
- There is no independent oversight of these platforms.

Other observations included:

- Arrangements established by the platforms with the workers are usually consciously framed to avoid an employment relationship arising between the worker and the platform.
- Claims by the platforms that gig workers are flexible seeking entrepreneurs was proven to be entirely false, by demonstrating too much control over what the "contractor" can and cannot do, including setting prices for end users.
- Platforms are unapologetic that they have chosen to operate outside the employment regulatory framework.
- Tech platforms are designed to create significant legal barriers to platform workers seeking to improve pay and conditions by organising collectively.

Analysis - The Big Questions

So, what can we conclude? Does precarious work exist and can it be defined?
Well yes, we know it consists of several classifications including casual, part time and contractor, and others that don't quite fit but are a part of the problem such as franchisees.

Is precarious employment/insecure work on the rise as claimed by the ACTU and other advocates?
Well, in the last 20 years, it could be argued that it has somewhat stabilised at roughly 25%, or 1 in 4 workers. However, prior to that, it was on the rise and has seen boom periods (late 80s to late 90s). However, evidence does suggest that this data only pertains to casual employment. Other forms of precarious employment such as contractors and franchisees remain scarce. Part time employment, whilst not precarious in nature, is defined as insecure work and is steadily increasing.

Precarious employment is not increasing in some areas (casuals) but is in others (part-time). In other areas, we just do not know how much, if at all (contractors and franchisees).

Do business models exist that use precarious work models to increase profits by underpaying workers in the form of less entitlements?

Well yes.

Are these business models leveraging gig economy technology?

Since the Uber ruling by the FWC, and determinations by the FWO, the answer is no. However, the argument is not black and white. The FWC has stated in many cases where boxes are being ticked that contractors are actually employees. Unfortunately, there are just not enough boxes being ticked to rule outright that Uber drivers/riders are to be legally classified as employees.

And lastly, the gig economy, is it driving an increase in precarious employment?

The simple answer is that gig economy technology does facilitate new growth of contractor work such as deliveries and taxis. However it does so on platforms that are designed to navigate outside of Australia's employment regulatory framework, by exploiting the FWC's contractor test. This is in addition to the FW Act's failure to adapt to technological change.

Contrary to much of the misinformation spread by these platforms, there is no evidence to support that "entrepreneurs are seeking to jump from gig to gig", but rather, much evidence to the contrary. And nor do we have real oversight/regulation of gig technology. But, when looking at the stabilisation of non-permanent workers at roughly 25% between 1998 and 2017, **the answer becomes a clear cut no, the gig economy is not increasing precarious employment in Australia**.

Otherwise between the apple iPhone/Pad/app boom of 2007-10 and now, we would have seen this figure increase, not remain stable. As frustrating as this may seem, the statistics just do not support the gig economy, or that tech companies like Uber, Foodora etc, are increasing precarious employment in Australia. This proves that the current issue of precarious employment remains a wider problem than that of the growing gig economy.

Moreover, recent cases such as the Skene case and Rossato case show that large scale business models do exist utilising forms of precarious employment outside of technology. It could be argued that those leveraging technology such as Uber are simply innovating (Stanford, 2017) within the current legal requirements of the Act and the FWC's contractor test. What we can safely conclude is that the FW Act has failed to adapt to technological change. Additionally, the FWC's contractor test - which does not allow for technological innovation, especially in the context of the gig economy - is a frivolous test.

As Stanford 2017 states, *"standing in the way of the gig economy is no more feasible than the fruitless efforts of Luddites to stop the steam engine and the spinning jenny."*

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