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"RIGHTS AND OBLIGATIONS OF EMPLOYERS IN THE GIG ECONOMY"

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Introduction

1. It is indeed a great honour and privilege for me to be invited here to this conference to deliver my paper on *"Rights and Obligations of Employers In the Gig Economy"*. I wish to express my heartfelt gratitude to the organizer for giving me this opportunity to present this discourse which I believe is fairly new in Malaysia. As a matter of practice, I must place on record a caveat that the views expressed here are mine alone and not that of the Industrial Court of Malaysia.

2. Before I begin my presentation, perhaps it would be appropriate to call into mind some of the basic rights of both employers and employees. (The list is not exhaustive, though). This is important as they form the basis of an employer-employee relationship.

2.1. Employer rights and responsibilities

All employers have the right to appoint and dismiss workers in accordance with proper procedures and to expect reasonable performance from their employees.

2.2. Rights of Employees

An employee or worker is entitled to the following rights:

- health and safety at work:
- equal opportunities for women and men

- protection against discrimination
- Protection against unfair labour practices.

What is gig economy?

3. We have heard about musicians and artists performing gigs at places of entertainment. As we all know, they are short term performances for a particular event. Gigs have now taken a new dimension altogether. Collins dictionary defines " *Gig economy*" as : *" an economy in which there are few permanent employees and most jobs are assigned to temporary or freelance workers".* **(Collins English Dictionary)**

4. In other words, it refers to workers in an informal economy. The term "informal economy," replacing the previously used term "informal sector," is used to refer to workers and companies that are not recognized or protected under legal and regulatory frameworks and are characterized by a high degree of vulnerability. **(International Labour Organization Report 2002).**

5. The co –founder of Airbnb , Brian Chesky has this to say about gig economy "

> *"There were laws created for businesses and there were laws created for people. What the sharing economy did was create a third category: people as businesses."*

6. To give the simplest example of a gig worker, Uber stands out as a perfect reference. Other examples include Grab, Food Panda, etc. Uber Technologies, Inc (Uber) provides a service whereby individuals in need of vehicular transportation can log into the Uber software application on the smartphone, request a ride, be paired via the Uber application, with an available driver, be picked up by the available driver, and ultimately be driven to their destination, Uber receives a credit card payment from the rider at the end of the ride, a significant portion of which it then remits to the driver who transported the passenger. In all these, Uber claims that it is a technology company and not a transportation company as it merely offers a software application to connect the driver and the passenger. Uber drivers are gig workers.

7. CNN Money reported on the 24th of May 2017 that the gig economy was now estimated to be about 34% of the workforce in the United States and is expected to be 43% by the year 2020"**. (CNN Business May 24, 2017)**

8. In Malaysia gig economy workers comprised 9.4% of the total workforce in 2017. These figures were much higher in 2015 (10.0%) Interestingly, the majority of them were urban workers and had secondary education. The figures we are looking at now were the statistics two years ago**. (Press Release Informal Sector Work Force Survey Report, Malaysia, 2017, Department of Statistics, Malaysia).** A recent report by the World Bank shows that 26% of

the Malaysian workforce comprise of freelancers a.k.a. gig workers**.** **(The Star Business News, 6 April 2019).**

Definition of a Workman

9. As a starting point, perhaps it may not be wrong to classify persons involved in the informal economy as informal labour. When we talk about labour, it is synonymous with workers. In this paper, the term "labour", "workman" and "worker" will be used interchangeably. In our Malaysian context, there are sufficient statutory legislations on the definition of who is a worker.

10. The major and commonly referred to legislation involving workers is **Section 2 of the Industrial Relations Act of 1967 ("IRA 1967")** where it defines:

'workman' means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute".

11. To protect their position further, a contract of employment is defined in the IRA 1967 as:

… "Contract of employment" means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman.

12. The IRA of 1967 then goes on to define the following:

"employer" means any person or body of persons, whether corporate or unincorporated, who employs a workman under a contract of employment, and includes the Government and any statutory authority, unless otherwise expressly stated in this Act.

13. There is also the other legislation i.e. the Employment Act 1955 which governs employed persons and carries the following definitions:

"employee" means any person or class of persons-

Any person, irrespective of his occupation, who has entered into a contract of service with an employer under which such person's wages do not exceed two thousand ringgit a month".

"employer" means any person who has entered into a contract of service to employ any other person as an employee and

includes the agent, manager or factor of such first mentioned person, and the word "employ", with its grammatical variations and cognate expressions, shall be construed accordingly.

14. Also relating to the workman is **Workmen's Compensation Act 1952** where a "workman means:

"……. the expression "workman", subject to the proviso to this subsection, means any person who has, either before or after the commencement of this Act, entered into or works under a contract of service or of apprenticeship with an employer, whether by way of manual labour or otherwise, whether the contract is expressed or implied or is oral or in writing, whether the remuneration is calculated by time or by work done and whether by the day, week, month or any longer period:

Provided that the following persons are excepted from the definition of "workman":

(a) ……..

(b) a person whose employment is of casual nature and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club.

15. Other laws governing a workman includes the **Occupational Safety and Health Act 1994 ("OSHA 1994")** which provides for the safety of workers and reads :

> *"Contract of service" means any agreement, whether oral or in writing whether express or implied, whereby one person to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract.*

16. The definition of a workman under the IRA 1967 does not state that to be a workman, a person has to be employed in a substantive capacity or on a temporary basis. However, O.P. Malhotra in his book: "The Law of Industrial Disputes, Vol. 1, 6th Edn. at page 675 defines the word 'workman' in the Industrial Disputes Act, 1947 of India, as:

> *" The definition does not state that a person, in order to be a workman, should have been employed in a substantive capacity or on a temporary basis in the first instance, or after he is found suitable for the job, after a period of probation. In other words every person employed in an industry, irrespective of his status – be it temporary, permanent or of a probationer – would be a workman [see* ***Hutchian v. Karnataka State Road***

Transport Corpn (1983) 1 LLJ 30, 37 (Kant) (DB), per Rama Jois J.]. ” .

17. So, all these laws cover and protect a workman in one way or another. The courts in Malaysia have always been liberal in dispensing justice with regards to equity and good conscience where workers rights are concerned. This is in consonant with Section 30(5) of the IRA 1967 viz, to act according to equity, good conscience and the substantial merits of the case.

Are Gig Workers Employees of the Employer?

18. In the gig economy, employers tend to distance themselves from being identified as the principal to the person performing a certain task on their behalf. Thus, the common stance taken by an employer in reference to gig workers is that they are independent contractors performing services for the customers and not their employees. To determine if workers are performing services to a company, and are therefore employees rather than independent contractor, it would perhaps be helpful to consider the following factors.

19. Employers' Five Factor Test

1. Whether the company exercises significant control over the details of the work;
2. Whether the worker is relying on the proceeds of the work as a primary or sole source of income;

3. Whether the company relies on the workers, collectively, as a significant, consistent revenue generator;
4. Whether the employer is operating in an industry that traditionally utilizes employees or independent contractors; and
5. Whether the arrangement is defined by a contract of adhesion with an unsophisticated party.

(**Ben Z. Steinberger, Fordham Journal of Corporate & Financial Law Volume 23, Number 2 2018 Article 5 Redefining 'Employee' in the Gig Economy: Shielding Workers from the Uber Model)**

CONTRACT FOR SERVICE?

20. More often not, businesses providing services through digital technology tend to deem gig workers as independent contractors. Let us examine some of the cases which dealt with the issue of independent contractors. In the case **SYARIKAT KILANG PAPAN PESAKA TRENGGANU BHD., TRENGGANU & TIMBER EMPLOYEES UNION [1987] 2 ILR 32,** the facts of that case are that Company was a sawmiller and the two Claimants were sawyers in its mill. Sawing at the mill was given out on an annually renewable contract to groups of sawyers under an agreement. The gangs of sawyers were paid on piece-rates - by the ton of timber sawn. The sawing machines they used belonged to the Company and the work was performed in the Company's premises. The Industrial Court in that case ruled that …

". *No test to determine whether a relationship is a contract of service or a contract for service can be conclusive, and the weight to be given to any element must be considered in the context of the relationship as a whole."*

21. Further, in another case (albeit not a local one) of **Bank Voor Handel En. Scheepraart N.V. v. Stratford [1953] 1 QB 248).** It was opined that:..

" (t)he modern test in determining if one is under a contract of service seems to be dependent on whether the person is part and parcel of an organization, in other words, whether the person is employed as part of the business ".

22. In the case of **Market Investigations Ltd v. Minister of Social Security [1969] 2 QB 173 at pp. 184-185)**, the English Courts held as follows:

"The fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is

that ***control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor****; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. (Emphasis added)*

23. Again, **Atiyah's Vicarious Liability in the Law of Torts (1967)** at p 59 states that, "*it seems reasonably clear that an essential feature of a contract of service is the performance of at least part of the work by the servant himself*"

Obligations of Employer

24. Having settled some of the preliminary issues, let us now examine how some of the obligations come into play in the employment contract. It is settled law that employers (and employees) inevitably stand in fiduciary capacity with each other. In **Azahari Shahrom & Anor v. Associated Pan Malaysia Cement Sdn Bhd [2010] 1 ILR 423)** , it was held as follows:

" It is trite that the association between employer and employee out of necessity is fiduciary in nature. There has to be

mutual trust and confidence that one would deal with the other in all fairness and rectitude over the rights and obligations flowing between the parties under the employment agreement. If one does an act or commits an omission which is inconsistent with that fiduciary relationship, then that act or omission will be male fides. This principle has equal application as against the employer and the employee in their respective positions viz. the employment relationship between them.

25. It was also the view in **Woods v. WM Car Services (Peterborough) Ltd. [1981] IRLR)** that:

"In our view it is clearly established that is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"

26. Also in the case of **Tego Sendirian Bhd v. Lim Yeak Ee [2002] 1 ILR p. 601** the Learned Chairman of the Industrial Court opined as follows:

" Now that the age when management could hire and fire at will is gone it is possible to assert that the employer has a legal duty to treat his employees with due respect and consideration mindful of their difficulties. It is no longer possible to treat an

employee as an expendable chattel or an object without feelings and emotions. ”

27. As much as an employer may wish to treat persons delivering its business to its customers as independent contractors or as having a contract for service, it may not be that simple. To emphasize the case position, the case of **Mary Colete John v. South East Asian Insurance Bhd [2010] 8 CLJ 129** (“ **Mary Colete ”**) explains it quite clearly. In interpreting employment contracts, Federal Court had this to say:

“It is apparent that in Malaysia, the term "contract of employment" is used interchangeably with "contract of service" as noted above in the Employment Act 1955 and the Industrial Relations Act 1977 respectively. However despite the difference in the way in which legislation has defined the term "contract of service" or "contract of employment" the essential characteristic of these definitions is that the contract must be between an employer and an employee with regard to the provision of service by the employee. It is also to be noted that by statutory definition the term "workman" is used interchangeably with the term "employee".

28. To explain the application of the above definitions, Mary Colete’s case is a classic example where informal workers could seek remedy if they can bring themselves within the definition of a

worker. This was not an industrial relations case but one of bodily injury claim. The Appellant Mary Colete ("Colete") was a freelance beautician. On the 24th of July of 1985, one Angel Helen ("Angel") employed Colete to dress, beautify and make-up her brother's bride for a professional fee of RM 100.00. Angel also provided transport. On the fateful day, the motor vehicle carrying Colete and which was driven by Angel's brother met with an accident. Colete successfully mounted a claim against Helen and her brother for bodily injuries claim. However, the insurers of the motor vehicle were found not liable to indemnify the vehicle owners as the Court because Colete was not carried in the vehicle *"in pursuance of a contract of employment"* with Angel. Colete had admitted that she was self-employed and that Angel was not her employer. Although it was not a claim involving industrial matters but one of personal injuries, the Court went at length to examine all the available legislations to determine if Colete had a contract of employment.

29. The Court in its judgment further made the observation below:

> *"The facts in this appeal by their very nature indicated that the appellant was engaged for a specific propose. Nothing here was admitted that she would be directed by Angel as to how the beautifying process of the bride could take place. The appellant herself denied being an employee. This reduces the appeal to a single matter. We are not here concerned with nomenclature but to ascertain what is the true nature of the relationship of the*

parties. The appellant cannot by labeling or formulating some words change the true nature of the relationship. There is not here a construction of a written contract but an appraisal of the whole nature of the relationship."

It is clear from this judgment that mere labeling does not alter the true relationship between the parties.

30. In another decision of the Federal Court in the case of **Assunta Hospital v. Dr A Dutt [1980] 1 LNS 121** was of the view that the definition of a workman was in their view is a mixed question of fact and law when it opined as follows;

" The question whether Dr. Dutt was a workman within the definition in the Act so as to avail himself of the provisions thereof, in our view and with respect, is a mixed question of fact and law and clearly within the province of the Chairman to find in a reference to him of the workman's representations of dismissal without just cause or excuse."

31. It would appear that the issue of whether there is an employer-employee relationship in a gig economy can only materials if the aggrieved party can bring himself within the definition of a worker. Our courts had always maintained a very liberal approach in dealing with workers' rights. Take the case of **Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687** where

the Federal Court also in deciding whether a person is a workman decided as follows:

> *"It is equally clear, from its award, that the Industrial Court addressed its mind to the nature of the duties and functions of the appellant as well as to the degree of control exercised by the respondent over him. It asked itself the right question and took into account relevant considerations when arriving at its decision. "*

The Current Position

32. So, it is clear that any employed person enjoys sufficient protection under the law. It is of great importance that the Civil Law Act 1956 allows the application of common law of England and the rules of equity as administered in England in Malaysian case. Section 3 of the Act provides as follows:

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall -

(a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;

(b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;

(c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

(2) Subject to the express provisions of this Act or any other written law in force in Malaysia or any part thereof, in the event of conflict or variance between the common law and the rules of equity with reference to the same matter, the rules of equity shall prevail.

33. Having said that, let us visit a couple of the recent decisions by the Courts in England which dealt with matters involving gig workers. The more prominent one (and which I humbly submit as applicable in Malaysia) is the case of **Uber B.V. ("UBV") (1) Uber London Limited ("ULL") (2) Uber Britannia Limited (3) - and - Yaseen Aslam (1) Respondents James Farrar (2) Robert Dawson & Others (3) Case No: A2/2017/3467. (*https://www.judiciary.uk/wp-content/uploads/2018/12/uber-bv-ors-v-aslam-ors-judgment-19.12.18.pdf)** The brief facts of the case in the words of the employment tribunal ("the ET ") are: "Uber is a

modern business phenomenon". It was founded in the United States in 2009 and its smartphone app, the essential tool through which the enterprise operates ("the App"), was released the following year. At the time of the ET hearing in 2016 there were about 30,000 Uber drivers operating in the London area, and 40,000 in the UK as a whole. The organisation has some 2 million passengers registered to use its services in London. 2. The Claimants are current or former Uber drivers working in London."

34. The claims brought before the ET were under the Employment Rights Act 1996 ("ERA"), read with the National Minimum Wage Act 1998 ("NMWA") and associated Regulations, for failure to pay the minimum wage and under the Working Time Regulations 1998 ("WTR") for failure to provide paid leave. Two of the Claimants, including Mr Aslam, also complained under Parts IVA and V of the ERA of detrimental treatment on "whistleblowing" grounds. The ET summarised the principal issues before them at the preliminary hearing as: "The core issue remains as to whether the claimants are "workers" for the purposes of the various definitions" The ET ruled that the claimants were employed by ULL as workers. The central decision of the ET was :

" 85….. We accept that the drivers (in the UK at least) are under no obligation to switch on the App. There is no prohibition against 'dormant' drivers. We further accept that, while the App is switched off, there can be no question of any contractual obligation to provide driving services. The App is the only medium through which drivers

can have access to Uber driving work. There is no overarching 'umbrella' contract. All of this is self-evident and Mr Linden did not argue to the contrary. 86. But when the App is switched on, the legal analysis is, we think, different. We have reached the conclusion that any driver who (a) has the App switched on, (b) is within the territory in which he is authorised to work, and (c) is able and willing to accept assignments, is, for so long as those conditions are satisfied, working for Uber under a 'worker' contract and a contract within each of the extended definitions."

35. The matter went of appeal to the Employment Appeal Tribunal ("EAT") where the central finding of the ET that the drivers were "workers" providing their services to ULL was upheld. The EAT held that the findings of the ET were consistent and that Uber had not met the high burden of showing that they were perverse.

36. The matter again went up on appeal to the Court of Appeal where in a gist, the grounds of appeal was essentially on the same grounds as those raised before the EAT. Their principal grounds of appeal was against the conclusion of the ET, upheld by the EAT, that any driver who had the Uber App switched on was within the Territory and was able and willing to accept assignment was, for as long as those conditions were satisfied, working for Uber (in the Claimants' case, for ULL) under a "worker contract" and a contract within each of the extended definitions. The appeal was also dismissed. It is interesting that during this appeal, the Court had

made references to some of the extrinsic evidence. Amongst them were from the publicity materials and correspondences Uber had frequently expressed themselves in language which appears incompatible with their arguments such as references to *"Uber drivers"* and *"our drivers",* to *"Ubers" (i.e. Uber vehicles*), to "*Uber [having] more and more passengers".* One Twitter feed issued under the name of Uber UK read: *"Everyone's Private Driver. Braving British weather to bring a reliable ride to your doorstep at the touch of a button."*

37. And in a correspondence, ULL wrote: *"The fact that an Uber partner-driver only receives the destination for a trip fare when the passenger is in the car Draft 19 December 2018 14:44 Page 38 Judgment Approved by the court for handing down. Uber BV & ors -v- Aslam & ors is a safeguard that ensures that we can provide a reliable service to everyone at all times, whatever their planned journey."*

38. And elsewhere, it said: *"Every single person that gets into an Uber knows that our responsibility to him doesn't end when they get out of the car."*

39. The solicitors for Uber had submitted that it provided the drivers with "business opportunities" and strenuously denied that they had jobs with the organisation. However, in their submission to the GLA Transport Scrutiny Committee, ULL had boasted of

"providing job opportunities" to people who had not considered driving work and potentially generating "tens of thousands of jobs in the UK."

40. Another observation was on the subject of payment of drivers. The Court had referred to the Partner Terms and New Terms which provided for Uber to collect fares on behalf of drivers and deduct their *'Commission' or 'Service Fee'*. However in its written evidence to the GLA Transport Scrutiny Committee, ULL had stated*: "Uber drivers are commission-based … Drivers are paid a commission of 80% for every journey they undertake."* The statement according to the Court had neatly encapsulated the Claimants' case that they are workers providing services to ULL as employer and it was wholly at odds with the Ubers' case. In conclusion, the Supreme Court had this to say:

> *" At the end of the day, the differences between ourselves and Underhill LJ on the main issue turn on two broad matters, one primarily a matter of law and the other primarily a matter of fact. The former concerns the extent to which Autoclenz permits the court to ignore written contractual terms which do not reflect what reasonable people would consider to be the reality. The latter concerns the question as to what reasonable people would consider to be the reality of the actual working relationship between Uber and its drivers. We consider that the extended meaning of "sham" endorsed in Autoclenz provides the common*

law with ample flexibility to address the convoluted, complex and artificial contractual arrangements, no doubt formulated by a battery of lawyers, unilaterally drawn up and dictated by Uber to tens of thousands of drivers and passengers, not one of whom is in a position to correct or otherwise resist the contractual language. As to the reality, not only do we see no reason to disagree with the factual conclusions of the ET as to the working relationship between Uber and the drivers, but we consider that the ET was plainly correct.

41. In the case of **Pimlico Plumbers Limited & Charlie Mullins v Gary Smith; Royal Courts of Justice Courts of Appeal Case No: A2/2015/0196**.(**https://www.supremecourt.uk/cases/docs/uksc-2017-0053-judgment.pdf)** , the Supreme Court in England also upheld the findings of the Employment Tribunal that they were workers. . The brief facts in Pimlico are as follows:

42. Mr Smith was a plumber. He carried out plumbing work for Pimlico between 25 August 2005 and 28 April 2011. He claimed that, following a heart attack in January 2011, he was unfairly or wrongfully dismissed on 3 May 2011. Pimlico is a plumbing and maintenance company. The second appellant, Charlie Mullins, is its founder and owner. At the time of the Employment Tribunal's decision it had 75 office staff and 125 people, like Mr Smith, carrying out plumbing and maintenance work on its behalf. Mr Smith signed an agreement with Pimlico on 25 August 2005. It was in Pimlico's standard form but with blanks completed in

manuscript. The agreement, as completed in manuscript, described Pimlico as "The Company" and Mr Smith as the "sub contracted employee.

43. Pimlico argued that their plumbers were hired as 'independent contractors', as opposed to workers or employees – and that although they provided their own materials and did not have workers' benefits, they were paid significantly more than PAYE employees.

44. The Employment Tribunal , the Employment Appeal Tribunal and the Court of Appeal found that the Claimant was indeed a worker under s 230 (3) (b) of the Employment Rights Act 1996 and although the plumbers were not employees, they were workers, and as such were entitled to holiday pay, sick pay and other benefits despite being technically self-employed.

CONCLUSION

45. From the matters adverted above, it is humbly submitted that the rights and obligations remains the same for employers as with formal workers when it comes to dealing with gig workers. It is inevitable that when and if a Ministerial Reference involving an informal worker is made for termination without just cause or excuse, the Industrial Court will examine as a preliminary issue the surrounding circumstances to determine if the Claimant is indeed a worker. I believe that the trend is set to begin here in Malaysia

given the number of informal workers who at the moment consider themselves to be informal workers. The gravity and effects are yet to be seen. With that I conclude this paper with gratitude for your kind patience and the undivided attention with which you have obliged me here today.

Thank you.

12th day of June 2019

DOMNIC SELVAM GNANAPRAGASAM
CHAIRMAN,
INDUSTRIAL COURT, PERAK