4th ASEAN INTERNATIONAL COOPERATIVE SYMPOSIUM ON THE DEVELOPMENT OF LABOR LAW IN ASEAN

"THE FUTURE OF ASEAN: THE EMERGENCE OF GIG ECONOMY AND INFORMAL LABOR"

Wednesday 16th – Friday 18th August 2017

Dor – Shada Resort, Chonburi, Pattaya, Thailand

"LEGAL PERCEPTIONS OF INFORMAL LABOUR IN MALAYSIA"

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LEGAL PERCEPTIONS OF INFORMAL LABOUR IN MALAYSIA

This paper is an attempt to discuss the subject of informal labour in Malaysia from the legal perspective. It will be based on the current labour jurisprudence in Malaysia. Having said that, I wish to qualify by stating that the views expressed herein are exclusively mine and shall not be interpreted as that of the Malaysian Industrial Court. Any observations, opinions and /or comments expressed herein are not binding upon the Court or any other tribunals.

INTRODUCTION: GIG ECONOMY

To begin with it would be helpful to understand what "gig economy means. 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".*

This would essentially mean 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).**

DEFINITION OF WORKMAN

As a starting point, it is not wrong to say that persons involved in the informal economy are informal labour. To discuss the issues confronting a workman, it is necessary for us to understand who is a workman. In this paper, the term " labour", " workman " and " worker " will be used interchangeably. Fortunately in Malaysia, there are sufficient statutory legislations on the definition of who is a worker.

The major legislation in respect of workers' rights can be found in **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".

Further in the IRA of 1967, a contract of employment is defined 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.

And then, the IRA of 1967 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.

There is another legislation under the Employment Act 1955 which governs employed persons and carry the following definition:

"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.

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.

O.P. Malhotra's The Law of Industrial Disputes, Vol. 1, 6th Edn. at page 675 describing the definition of the word 'workman' in the Industrial Disputes Act, 1947 of India, reads:

" 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.]. "** .

In other words every person who employed in an industry, irrespective of his status – be it temporary, permanent or of a probationer – would be a workman **[Hutchian v. Karnataka State Road Transport Corpn (1983) 1 LLJ 30, 37 (Kant) (DB), per Rama Jois J.]**.

Thus, a person employed in such a capacity can be considered as a workman.

Further under the Malaysia Workmen's Compensation Act 1952 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.

Another law governing a workman is the **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.

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.

To emphasize the case in point, the Federal Court of Malaysia (the apex Court in Malaysia) in the case of **Mary Colete John v. South East Asian Insurance Bhd [2010] 8 CLJ 129,** in interpreting employment contracts the 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".

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. 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.

In another decision of the Federal Court in the case of **Assunta Hospital v. Dr A Dutt [1981] 1 LNS 5** was of the view that the definition of a workman was in their view is a mixed question of fact and law and clearly within the province of the Chairman [of the Industrial Tribunal]. Clearly, the issue of whether one has a contract of employment is one of fact and law. It must be pointed out that the above case involved formal labour. However, as the

decision suggests, the aggrieved party must bring himself under the definition of a workman.

LEGAL RECEPTION OF GIG ECONOMY IN MALAYSIA

The rights of workers; both formal and informal have always been protected in Malaysia. Given the nature of the tasks carried out by informal workers, the question then arises in the informal sector as to whether a person can considered as an employee or worker. By their nature, they are considered to be self-employed. However, if they are able to prove by their nature of their employment that they fall under the definition of a workman, they would be able to seek legal redress. The Courts in Malaysia had always maintained a very liberal approach in dealing with workers' rights. In the case of **Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687,** the Federal Court also in deciding whether a person is a workman decided as follows:

> " The interpretation of the term "workman" appearing in s. 2 of the Act requires an independent exercise, having regard to the nature and language of the Act, and the content, purpose, and policy of its enactment. This is necessary to ensure that the construction of the term truly reflects the collective will of Parliament and does not produce a result not intended by it.

The Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In accordance with well-settled canons of construction, such legislation must receive a liberal interpretation. The definition of the term "workman" is flexible, and is to be worked out on a case by case basis. **[emphasis added].**

The definition of "workman" applies to all contracts of service but not to independent contractors who are engaged under contracts for services. In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor but may not be the sole criterion. It is a question of fact. The capacity in which one is employed or the purpose of the employment does not answer the question of the definition of a "workman". It is the function of and the duty actually discharged by the particular claimant that is important and not merely the label that is attached to the particular employment or indeed the purpose of the engagement. "

So, it is clear that any employed person enjoys sufficient protection of the law. It is interesting to note 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. Having said

so, the recent decision by the Court of Appeal in England which ruled on the employment status in the gig economy in the case of **Pimlico Plumbers Limited & Charlie Mullins v Gary Smith ; Royal Courts of Justice Courts of Appeal Case No: A2 / 2015 / 0196** would certainly be an authority on the rights of informal workers. It would be interesting to examine the decision in Pimlico as it has far reaching effects on informal workers. The brief facts in Pimlico are as follows:

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.

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.

However, the Court of Appeal found in Mr Smith's favour, upholding an earlier tribunal decision that, 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.

As the laws in Malaysia provide for the importation of decisions from the courts in the Commonwealth jurisdictions, the decision in Pimlico is likely to applied extensively in respect of informal labour disputes. Pimlico's case can be used as a persuasive authority in similar disputes.

While the government recognizes the existence of informal labour and had made all possible efforts to enhance their standard of living, there are currently no specific labour laws to protect them. However, this does not prevent affected workers from bringing their cases to court for adjudication.

For a start, to show the governments' seriousness in helping workers in the informal economy, the government had recently enacted the Self-Employed Social Security Act 2017 ("ESSA 2017") where a self-employed person who has suffered personal injury due to an accident or occupational disease arising out of and in the

course of his self-employment activity shall be entitled to claim disability benefits. The government in its efforts to supplement the income of its citizens and being concerned with informal labour had enacted the ESSA 2017 as a way of protecting informal workers who are considered to be self-employed without a proper employer. "Self-employment activity" in the ESSA 2017 is defined as "... any activity in relation to the industry specified in the First Schedule." The First Schedule on the other hand provides:

(a) The service of carriage of passengers-

(i) by means of public service vehicle or motor vehicle owned by a person, or managed, maintained or operated by a person under any form of arrangement with the owner or lessor of the vehicle ; and

(ii) whether for hire or reward or for any other valuable consideration or money's worth or otherwise

This legislation basically covers Uber like drivers who provide "service of carriage of passengers" by means of their own vehicle. The self-employed must however be insured under this legislation by paying a monthly contribution equivalent to approximately 1.25% of his monthly income. That makes him an insured person under this legislation. This piece of legislation by far benefits persons who are engaged in the gig economy. It must be

remembered that the ESSA 2017 is not a piece of legislation to redress unfair dismissal but as pseudo-insurance scheme to protect self-employed workers.

I believe this is a positive step by the government in encouraging its citizens to venture into the gig economy. It is the right step forward by putting into place safety nets; so to speak, to encourage entrepreneurship. It is a clear sign of the government encouraging this sector of the economy and taking a positive step in that direction. The action of the government in doing so will spur innovation and encourage novel forms of doing business and providing services. At the same time, they are given legal recognition.

The benefits from ESSA 2017 are enormous. Benefits include constant attendance allowance, dependents' benefits, disablement benefit, education benefit, funeral benefit or medical benefits. An insured person or his next of kin (where applicable) may receive benefits under the following circumstances:

a. permanent total disablement – a situation where a disablement of a permanent nature, which disables a self-employed insured person from carrying out any self-employment activity which he was capable of performing prior to or at the time of the elf-employment injury;

b. temporary disablement – a condition resulting from self-employment injury which requires medical treatment and renders a self-employed insured person, as a result of such injury, temporarily incapable of carrying our any self-employment activity which he was capable of performing prior to or at the time of the self-employment injury;

c. permanent partial disablement – any disablement of permanent nature, which reduces the earning capacity of a self-employed insured person to carry out any self-employment activity which he was capable of performing prior to or at the time of the self-employment injury.

d. death of self-employed insured person – the dependents shall be entitled to dependents' benefits including his/her widow/widower and children ;

Whilst the ESSA 2017 may not be a legislation dealing with work related disputes faced by informal workers, it is certainly a recognition of workers in the informal economic sector. It is certainly a move in the right direction. The fact that informal economy has survived from time immemorial and there is no indication that it would disappear in the near future, the character however seems to change.

CONCLUSION

The matters adverted to above is a clear indicator that the government is taking pro-active steps in addressing problems affecting the workers in the informal sector. It is not difficult to imagine that given the trend of informal labour in Malaysia similar employee rights disputes such as that of Pimlico is likely to arise.

The trend is set to begin here. Should it happen, the courts would examine business models that seek to control people as if they were employees but claim as if they were not? Once the so-called 'self - employed' have been found to be workers, these workers would be able to enforce their rights in the court of law.

Dated the 13th day of August 2017